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No.

IN THE
Supreme Court of The United States
OCTOBER TERM, 1986

PINE STREET BAPTIST CHURCH, *et al.*, *Petitioners*,
vs.
SECURITIES INVESTOR PROTECTION CORPORATION
and FRED D. BRYAN, TRUSTEE, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT D. TUKE
FARRIS, WARFIELD & KANADAY
Nineteenth Floor
Third National Financial
Center
424 Church Street
Nashville, Tennessee 37219
(615) 244-5200
Counsel for Petitioners

Of Counsel:

KATHERINE M. ALLEN
FARRIS, WARFIELD & KANADAY
Nineteenth Floor
Third National Financial Center
424 Church Street
Nashville, Tennessee 37219
(615) 244-5200

58 pp

QUESTION PRESENTED

Does a United States District Court have jurisdiction and discretionary authority to require the Securities Investor Protection Corporation (SIPC) to pay prejudgment and post-judgment interest to customers of broker-dealers liquidated under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa to 78lll (1982), whose claims remained unpaid for seven and one-half years due to SIPC's protracted, unsuccessful litigation contesting their claims?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioners, Pine Street Baptist Church, First Church of the Nazarene, Randall Memorial Free Will Baptist Church, Fairwinds Baptist Church, Southmoor Baptist Church, Westwood Baptist Church, West Gate Baptist Church, First Church of God, Christian Schools, Inc. d/b/a Good Pasture Christian Schools, and Theatre Nashville and the respondents, Securities Investor Protection Corporation and Fred D. Bryan, Trustee. The petitioners have no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 23, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 788 F.2d 1208 (1986), is reprinted in Appendix A to this Petition. The Memorandum and Order of the District Court awarding interest is unreported and appears in Appendix B. The District Court's Memorandum and Order calculating the award of interest is unreported and appears in Appendix C.

The District Court's original decision that petitioner Pine Street Baptist Church qualified as a "customer" under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.*, is reported at 446 F. Supp. 844 (M.D. Tenn. 1977). The Court of Appeals' opinion affirming the District Court's original decision is reported at 679 F.2d 608 (6th Cir. 1982).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 23, 1986, and this Petition for a Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1982).

STATUTES INVOLVED

Statutes involved in the review of the Court of Appeals' decision are 28 U.S.C. § 1961 (a)(1982) and the following sections of the Securities Investor Protection Act of 1970, as amended: 15 U.S.C. §§ 78ccc(b)(1), fff-3(a), ggg(b), kkk(c), and 111(11) (1982).[1] The verbatim text of these statutes is reprinted in Appendix D to this Petition.

STATEMENT OF THE CASE

Petitioners are customer claimants in a broker-dealer liquidation proceeding under the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa to lll (1982) ("SIPA"). The jurisdiction of the District Court for the Middle District of Tennessee was originally invoked under SIPA and under 28 U.S.C. § 1331 (1982). Through SIPA, Congress created the respondent corporation, the Securities Investor Protection Corporation ("SIPC"), and established the "SIPC Fund" to provide for the orderly liquidation of failed securities brokerage firms and for the financial protection of their customers. (See Appendix A at page A2.)

On December 17, 1974, this proceeding was commenced in the United States District Court for the Middle District of Tennessee through the entry of SIPC in accordance

[1] For the sake of clarity, petitioners will cite current law, as did the Court of Appeals. The Court of Appeals stated that because the 1978 amendments to SIPA do not affect the issues in this case, it would cite to the current sections of SIPA. (See Appendix A at page A2n.1.)

with SIPA in a liquidation proceeding involving Ambassador Church Finance/Development Group, Inc. The District Court appointed respondent, Fred D. Bryan, as trustee (the "Trustee") to supervise that Company's liquidation under SIPA. After receiving notices from the Trustee in January, petitioners promptly filed customer claims with the Trustee in February 1975. In May 1975, the District Court authorized the Trustee to satisfy customer claims as expeditiously as possible and directed SIPC to advance the funds necessary to permit the Trustee to satisfy such claims. On June 2, 1975, SIPC advanced funds to satisfy the claim of at least one customer whose status SIPC did not dispute. (See Appendix A at page A3.)

After considerable delay, SIPC determined that petitioners did not qualify as "customers" under SIPA, and on that basis the Trustee rejected petitioners' claims in April 1976. Petitioners filed objections to SIPC's rejection of their claims and along with SIPC and the Trustee, litigated the customer status of Pine Street Baptist Church as a test case. (See Appendix A at page A2.) On January 9, 1981, the District Court decided that Pine Street qualified as a "customer" under SIPA. *In re Atkeison*, 446 F. Supp. 844 (M.D. Tenn. 1977). After an appeal by respondents, the Court of Appeals for the Sixth Circuit affirmed the District Court's decision on May 27, 1982. *SEC v. Ambassador Church Finance Development Group, Inc.*, 679 F.2d 608 (6th Cir. 1982).

Thereafter, additional delays resulted from SIPC's disagreement with the Trustee's contention that petitioners were entitled to interest on their payments. Finally, SIPC advanced funds to the Trustee to pay some of petitioners' net equity claims, without interest, in November 1982, and the remaining petitioners' claims in February 1983. (See Appendix A at page A3.)

Petitioners brought this action *as a part of the original liquidation proceeding* under SIPA seeking to recover prejudgment and post-judgment interest from SIPC for the seven and one-half year delay from the time SIPC advanced funds to pay the first undisputed customer claim to the time petitioners received the funds to which they were entitled. The District Court granted SIPC's motion to join the Trustee as a defendant. After a full hearing, on November 5, 1984, the District Court held that petitioners were entitled to prejudgment and post-judgment interest on their claims and ordered that SIPC pay this interest directly. (See Appendix B.) On January 9, 1985, the District Court ordered that SIPC pay interest calculated at the State of Tennessee statutory rate of six percent per annum, compounded annually, for the period from the date when SIPC advanced funds for the first customer claim to March 31, 1979, and at ten percent per annum compounded annually for the period from April 1, 1979 to the date of judgment.[2] The interest ordered to be paid to petitioners totaled $232,651.00. (See Appendix C.)

SIPC appealed to the Court of Appeals. On April 23, 1986, the Court of Appeals reversed the District Court, denied any prejudgment or post-judgment interest award, and remanded the case for entry of an order dismissing the action. (See Appendix A.)

The Court of Appeals' opinion began by summarily holding that the District Court should have dismissed the action based on this Court's decision in *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975). Without elaboration, the Court of Appeals interpreted *Barbour* as holding that SIPA does not give petitioners any cause of action against SIPC. (See Appendix A at page A5.)

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[2] Effective April 1, 1979, the allowable statutory rate of interest in Tennessee increased from six percent per annum to ten percent per annum. Tenn. Code Ann. §47-14-123 (1984).

The Court of Appeals then held that bankruptcy law applies to a liquidation proceeding under SIPA. Without recognizing exceptions in equity, the Court of Appeals ruled that because interest is not allowable against a debtor's estate absent a surplus, the District Court could not award interest to petitioners.

The decision below made no mention of the District Court's use of its discretion in awarding interest nor did the Court of Appeals recognize the distinction between prejudgment and post-judgment interest. The Court of Appeals simply found that because SIPA provides that SIPC advance funds only to pay a customer's "net equity" claim and the statutory definition of "net equity" does not include interest, SIPA does not allow SIPC to pay any interest to customers.

The Court of Appeals briefly discussed the District Court's reliance on the Ninth Circuit Court of Appeals' decision to award interest against the FDIC in *First Empire Bank v. Federal Deposit Insurance Corp.* 572 F.2d 1361 (9th Cir.), *cert. denied*, 439 U.S. 919 (1978). The Court below, however, refused to apply *First Empire* to uphold the award of interest against SIPC.

In closing, the Court of Appeals further stated that 15 U.S.C. §78kkk(c) "excuses" SIPC from paying interest even though SIPC did not raise this section as a defense at trial. The Court of Appeals decided, in short, that petitioners had no cause of action for interest under SIPA, that the proceedings were in the nature of bankruptcy proceedings in which interest is not awardable, and that SIPC is immune from liability in any event under SIPA.

REASONS FOR GRANTING THE WRIT

In summary, the opinion by the Court of Appeals below ignores the fact that this claim had been properly brought under SIPA as part of the original proceeding commenced

in 1974, disregards the plain language of SIPA, which allows such a claim against SIPC, and misapplies this Court's decision in *SIPC v Barbour*. The Court of Appeals' opinion is in conflict with this Court and with other Courts of Appeals which have applied equitable principles to allow interest awards in insolvency proceedings. The decision below also conflicts with this Court and with other Courts of Appeals which recognize the trial court's discretionary power to award prejudgment interest, and is contrary to the federal statute providing for post-judgment interest. Most importantly, by insulating SIPC from customer claims both for prejudgment and post-judgment interest after SIPC has deliberately withheld funds to which the customers were entitled, the Court of Appeals gives SIPC the incentive to delay payment of such funds. This incentive will undermine the explicit purposes of SIPA to encourage confidence in the broker-dealer industry and to provide for prompt payment of customer claims. An opinion with such far-reaching adverse consequences for broker-dealer customers merits review by this Court.

I.

THE COURT OF APPEALS' INTERPRETATION OF *SIPC v. BARBOUR*, 421 U.S. 412 (1975), IS CONTRARY TO THE PLAIN MEANING AND PURPOSE OF SIPA

The Court of Appeals incorrectly construed this Court's decision in *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975), as creating a complete bar to private claims directly against SIPC. (See Appendix A at page A5.) This interpretation of *Barbour* is contrary to the explicit language of SIPA and frustrates the purpose of the statute.

At the outset, *Barbour* cannot control the present case because the cases are factually and procedurally dissimilar. *Barbour* denied an implied right of action by which customers could sue *under SIPA* to "compel the SIPC to exercise its statutory authority for their benefit," and was expressly limited to this narrow ground. *Barbour*, 421 U.S. at 413-14. In the present case, petitioners' claims arise as a *part of* previously commenced proceeding under SIPA to which SIPC is a proper party and to which SIPC has never objected. Additionally, petitioners' specific claims before the Court do not involve the substance of SIPA at all: they are equitable claims that have force independent of the statute. This Court has endorsed actions for interest without statutory authorization where consistent with legislative intent and principles of equity. *See Rodgers v. United States*, 332 U.S. 371, 373 (1947); *Billings v. United States*, 232 U.S. 261, 284-88 (1914). By extending *Barbour* beyond the self-imposed limits of its holding, the Court of Appeals has created an unnecessary conflict between *Barbour* and long-standing Supreme Court precedent recognizing equitable actions for interest. Therefore, the implied right analysis presented in *Barbour* should not have been used to preclude petitioners' equitable claims for interest in this proceeding.

Even if petitioners' claims for interest could be classified as requiring a separate implied right of action under SIPA, the facts of the present case completely satisfy the criteria for granting such a right. The implied right sought in *Barbour* was not denied because of an absolute bar to such an action under SIPA, but because it failed to meet either prong of the two-part test enunciated in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1975) (hereinafter cited as *Amtrak*). Unlike the private action in *Barbour*, however, the right of action sought by petitioners satisfies

the requirements for an implied right of action both as employed in *Amtrak* and as later refined in *Cort v. Ash*, 422 U.S. 66 (1975).

In *Cort*, this Court set forth a four-part test for assessing the validity of an implied right of action:

> (1) Is the plaintiff one of the class for whose *especial* benefit the statute was enacted?
>
> (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?
>
> (3) Is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff?
>
> (4) Is the cause of action one traditionally relegated to state law in an area basically the concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort, 422 U.S. at 78.

It cannot be disputed that petitioners fall within the class of intended beneficiaries under SIPA. Their status as customers under SIPA has been judicially determined, and the stated purpose of that Act is to provide greater protection for the customer class. *See Barbour*, 421 U.S. at 413. It is obvious, therefore, that petitioners satisfy the first *Cort* criterion.

With regard to the second *Cort* element, there is also clear and convincing evidence that Congress intended to allow the type of direct claims brought by petitioners. The statute expressly authorizes SIPC to "sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal." 15 U.S.C. § 78ccc(b)(1). Such a clause generally has been held to constitute both a waiver of governmental immunity and

express authorization for direct suits. *See Franchise Tax Board of California v. U.S. Postal Service*, 467 U.S. 512 (1984); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939).

This sue-and-be-sued clause was mentioned in *Barbour* but was not held to be controlling in light of the subsequent explicit grant of SEC authority over actions to compel SIPC intervention:

> Respondent argues that because Congress provided that the SIPC can 'sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal,' 15 U.S.C. §78ccc(b)(1), it must have contemplated occasions when an aggrieved customer of a member firm would be able to sue. *In light of the specific terms of the more relevant section governing suits to compel* the SIPC to act for the benefit of investors, that conclusion is unwarranted.

Barbour, 421 U.S. at 420, n.3 (emphasis added). Hence, *Barbour* simply resolved a conflict between competing grants of authority within SIPA; it did not judicially invalidate the entire sue-and-be-sued clause.

The Court of Appeals opinion below did not deal with the sue-and-be-sued clause at all, but apparently assumed that all direct suits against SIPC must be maintained by the SEC. (See Appendix A at page A5.) Given that SEC suits are centralized in federal court under 15 U.S.C. § 78 ggg(b), this position cannot be maintained without rendering the express authorization for state court suits against SIPC a complete nullity. Therefore, the Court of Appeals has misconstrued the sue-and-be-sued clause contained in SIPA, which is a clear indication of congressional intent to allow direct private actions against SIPC such as the claims brought by petitioners.

The third element of the *Cort* test is whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff. The claim in *Barbour* failed this test because of concern that the power to initiate SIPC intervention would be abused with disasterous consequences. *Barbour*, 421 U.S. at 422-23. In the present case, however, jurisdiction under SIPA was previously invoked, removing the issue of abuse, and petitioners only seek equitable recovery of the economic value of their recognized claims under SIPA. Customers are not protected, and therefore SIPA is frustrated, if SIPC is allowed to delay payments so unreasonably without also paying interest. Customer losses attributable to foregone interest can easily equal or surpass the amount of the original principal, as petitioners' case illustrates. Moreover, if the Court of Appeals is correct, SIPC always has a strong incentive to delay payment since it retains these proceeds. If allowed to stand, the Court of Appeals' decision will authorize SIPC to exploit this conflict of interest with impunity. Customers will eventually realize that SIPC protection has been eroded, and the congressional intent underlying SIPA will become a policy derelict.

Although Congress gave the SEC authority to supervise SIPC operations, it could not have intended this to be the sole check on actions by SIPC which adversely affect customer claims. Allowing an implied private right of action for interest in those cases where the SEC has failed to insure SIPC's prompt payment of customer claims would complement the SEC's *ex ante* supervisory role. Such private monitoring is an efficient way to guarantee fair treatment to investors, and thereby serves SIPA's stated goal of promoting confidence in broker-dealers and the securities industry.

The final *Cort* test asks whether the cause of action sought is traditionally relegated to state law, such that it

would be inappropriate to infer a cause of action based solely on federal law. SIPC is one of a number of independent corporations created by Congress to serve the public interest. These corporations are creatures of federal law and exercise their powers under federal authority. An abuse of that authority would be a matter of federal concern that lies beyond state law. *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971). It would not, therefore, be inappropriate to infer a private right of action under federal law. Moreover, federal law governs post-judgment interest in federal cases; 28 U.S.C. § 1961(a) (1982); and clearly can be applied to grant prejudgment interest. *See Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981).

From the foregoing analysis, it is clear that petitioners' claim is fundamentally different from that presented in the *Barbour* case. Petitioners' claims are part of a previously commenced action under SIPA, and do not depend on the substance of SIPA, but instead arise under general principles of equity. Furthermore, whereas an implied right was inconsistent with SIPA on *Barbour's* facts, petitioners' claim satisfies all the necessary criteria for such an action. The Court of Appeals decision cannot be allowed to stand without transforming the *Barbour* holding into an unjustified *per se* prohibition against any direct private claim against SIPC. Certiorari should be granted in order to preserve both the congressional intent underlying SIPA and to recognize fundamental equitable decisions rendered by this Court.

II.

THE COURT OF APPEALS' DECISION CONFLICTS WITH PRINCIPLES OF EQUITY APPLIED BY THIS COURT AND BY OTHER COURTS OF APPEALS

Whether a District Court can order SIPC to pay interest on contested customer claims is a question of first impression for this Court. The Court of Appeals' decision that a District Court has no jurisdiction or authority to do so in its sound discretion is contrary to this Court's and other Courts of Appeals' decisions in cases involving analogous circumstances. By broadly holding that SIPC cannot be required to pay either prejudgment or post-judgment interest under the provisions of SIPA, the decision below directly departs from traditional notions of equity and has the result of diminishing the protection of customers envisioned by Congress in SIPA.

The Sixth Circuit Court of Appeals differs fundamentally with rulings of this Court and other Courts of Appeals in holding that because a proceeding under SIPA is governed by bankruptcy law principles, interest is not awardable. This Court has held that in an insolvency proceeding in which funds are withheld from certain creditors while other creditors are paid, interest may be awarded to those creditors who receive late payment. *Ticonic National Bank v. Sprague*, 303 U.S. 406 (1938); *see Armstrong v. American Exchange National Bank*, 133 U.S. 433 (1890). Other Courts of Appeals have so held as well. *See First Empire Bank v. Federal Deposit Insurance Corp.*, 572 F.2d 1361 (9th Cir.) *cert. denied*, 439 U.S. 919 (1978); *Bryant v. B. & L. Farms Co.*, 343 F.2d 581 (5th Cir. 1965).

In *Ticonic*, this Court allowed interest to creditors of a liquidated national bank. After acknowledging the gen-

eral rule that in insolvency proceedings interest does not accrue on unsecured claims, this court went on to say:

> [I]nterest is proper where the ideal of equality is served, and so a creditor whose claim has been erroneously disallowed is entitled on its allowance to interest on his dividends from the time a ratable amount was paid other creditors.

303 U.S. at 411.

In the decision below, the Court of Appeals refused to apply this "ideal of equality among creditors." The District Court ordered SIPC to pay petitioners out of its own assets in order "to treat claimants of like class equally." (See Appendix B at page B5.) By rejecting the District Court's equitable solution, the Court of Appeals stands in opposition to the principles applied by this Court in *Ticonic.*

Equally in conflict with the decision below is *First Empire Bank v. Federal Deposit Insurance Corp.* 572 F.2d 1361 (9th Cir.), *cert. denied,* 439 U.S. 919 (1978). In *First Empire,* the Ninth Circuit held that the creditors of a liquidated bank were entitled to interest from the Federal Deposit Insurance Corporation ("FDIC") in its receiver capacity because the FDIC did not satisfy the claims of all creditors at the same time. In the decision below, the Court of Appeals attempted to distinguish *First Empire* from petitioners' case by explaining that SIPA does not require "ratable dividends" as required by the National Banking Act and that SIPC was not the receiver, trustee or fiduciary responsible for administering the estate of the debtor broker-dealer. These distinctions, however, are irrelevant to the principles applied in *First Empire,* as the District Court correctly held.

The basis of the decision to award interest in the *First Empire* case was the ideal of equality among creditors articulated in *Ticonic.* SIPC also must treat customers

making claims under SIPA equally. Although the amount of the customer claims may vary, SIPC must advance funds to satisfy the full "net equity" claim of each customer up to the proper statutory limit. 15 U.S.C. §§ 78fff-3(a), 78lll(11). In addition, although SIPC may not be a fiduciary in liquidating broker-dealers, it is responsible under SIPA for advancing money to "promptly satisfy customer claims." 15 U.S.C. § 78fff-3(a). SIPC's duties under SIPA subject it to principles of equality among claimants analogous to those the Ninth Circuit applied in *First Empire* and which this Court applied in *Ticonic*. The decision below stands in direct conflict with such "ideals of equality" and fair treatment among claimants.

Moreover, the Court of Appeals' opinion glosses over the distinction between awarding interest on claims, which is generally not allowed in bankruptcy proceedings, and awarding interest on withheld dividends, which other circuit courts have permitted. *First Empire Bank*, 572 F.2d 1361; *Bryant v. B.&L. Farms Co.*, 343 F.2d 581 (5th Cir. 1965).

In the *Bryant* case, the Fifth Circuit Court of Appeals upheld an award of interest in a bankruptcy proceeding in which the plaintiff's claims had been withheld during two years of litigation. The court recognized the critical distinction and stated:

> It is well to observe that we are not here dealing *with interest on claims* in bankruptcy, but *interest on dividends withheld* after creditors of the same class had been paid dividends due them.

343 F.2d at 583 (emphasis in original).

In this case, petitioners are seeking interest not on prepetition claims against the debtor's estate, but on "dividends" which SIPC withheld while paying other claimants. The Court below declined to draw this distinction

and therefore is in conflict with other circuits on this issue.

The analysis in the decision below also conflicts with decisions by this Court and other circuit courts which award interest as compensation for damages (the "debt theory") or to prevent unjust enrichment. This Court held in *Billings v. United States*, 232 U.S. 261 (1914), that an award of interest is appropriate in order to compensate a party for the damage suffered by being deprived of the use of money it was properly owed. *See Miller v. Robertson*, 266 U.S. 243 (1924). The Second Circuit Court of Appeals recognized this rule in *Ruskin v. Griffis*, 269 F.2d 827 (2d Cir. 1959); and the Third Circuit applied it in *Howmet Aluminum Corp. v. Hartford Accident & Indemnity Co.*, 665 F.2d 476 (3d Cir. 1981). In contrast, the Court of Appeals refused to award interest to compensate petitioners for the damages suffered while waiting seven and one-half years for payment of funds to which they were entitled under SIPA.

Equally at odds with the decision below are holdings by this Court and by other circuit courts which award interest to prevent unjust enrichment. This Court has long recognized the principle that:

> It is no hardship for one who has had the use of money owing to another to be required to pay interest thereon from the time when payment should have been made.

Spaulding v. Mason, 161 U.S. 375, 395 (1896). This Court held in *Crescent Mining Co. v. Wasatch Mining Co.*, 151 U.S. 317 (1894) that when a payment is adjudicated as having been due at a certain time, and the defendant has held the payment and had the benefit of the money since that time, a court may award interest to prevent unjust enrichment. The age of these cases and the lack of more

recent Supreme Court decisions on this issue demonstrate the fundamental nature of this proposition.

Many other circuit courts have awarded interest to one party to prevent the unjust enrichment of another who had the benefit of money belonging to the first party. *See e.g., United States v. Dollar Rent-A-Car Systems, Inc.*, 712 F.2d 938 (4th Cir. 1983) (interest may be awarded on a federal contract claim on monies that were withheld); *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981) (the doctrine of unjust enrichment calls for an award of interest greater than the statutory rate); *Davis Cattle Co. v. Great Western Sugar Co.*, 544 F.2d 436 (10th Cir. 1976), *cert. denied* 429 U.S. 1094 (1977) (interest may be awarded to the plaintiff equal to the interest defendant must pay for its borrowed funds). In the *Peterson* case the Third Circuit best explained the reasons for applying equitable principles to prevent unjust enrichment:

> Mindful of 'those considerations of basic fairness and equity which suggest a more flexible rule..., [and] not unmindful of the fact that at the currently high money-market rates [a contrary] ruling appears to create a built-in incentive to withhold sums due, and indeed, to prolong litigation'...we will remand the case for redetermination by the district court of the damages for delay, which may be set at a rate greater than Pennsylvania's legal rate of interest.

661 F.2d at 298 (citation omitted).

The Court of Appeals below did not address the fact that SIPC earned more interest on the funds withheld from the petitioners for seven and one-half years than the amount of interest the District Court ordered SIPC to pay petitioners. The decision below implicitly rejects the unjust enrichment doctrine and thus, is contrary to equitable awards of interest made by this Court and by other circuit courts to prevent unjust enrichment.

III.
THE COURT OF APPEALS' DECISION IS CONTRARY TO THE PURPOSE AND INTENT OF SIPA

In its opinion below, the Court of Appeals interpreted 15 U.S.C. § 78kkk(d) to provide immunity for SIPC to suit for actions taken in good faith. (See Appendix A at page A6.) The effect of this provision on petitioner's claim should not have been considered on appeal, however, because it constitutes an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure, which was waived when SIPC failed to raise it at trial. *See Senter v. General Motors Corp.*, 532 F.2d 511, 530 (6th Cir. *cert. denied*, 429 U.S. 870 (1976); *Roe v. Sears, Roebuck & Co.*, 132 F.2d 829 (7th Cir. 1943); 8A Moore ¶ 8.27 [3] at 1853 (2d Ed. 1984); Wright & Miller, *Federal Practice and Procedure*: Civil §1278 (1969). Because this defense was waived, no evidence was introduced or considered on the issue of SIPC's good faith — an omission that led the Court of Appeals to assume that no bad faith was alleged. (See Appendix A at page A10.) At the very least, if bad faith were an issue, the case should have been remanded to the District Court for discovery and argument on the issue of SIPC's good faith. Therefore, the Court of Appeals erred both in considering a waived defense and in rendering a underlying *de novo* factual adjudication based on an incomplete record.

In any event, the Court of Appeals erred substantively in its application of 15 U.S.C. § 78kkk(d) to petitioners' action. The legislative history to this section makes clear that it can only be raised as a defense to tort actions. The House Report reads:

> [this section] provides that neither SIPC nor its directors shall have liability for actions taken or omitted in good faith under or in connection with matters contemplated by the legislation. This

> primarily intended to insure that SIPC or its directors are not subjected to tort liability for their actions in the course of SIPC's operations so long as they are acting in good faith. *This, of course, is not intended to relieve SIPC from liability for its contractual obligations.*

H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5254, 5278 (emphasis added). Petitioner's action is not in tort, but is based instead on a theory of damages from withheld funds, which is contractual, or unjust enrichment, which is quasi-contractural in nature. *See Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981); *Herrmann v. Gleason*, 126 F.2d 936 (6th Cir. 1942); *Paschall's Inc. v. J.P. Dozier*, 219 Tenn. 45, 49, 407 S.W. 2d 150, 154 (1966). Hence, the statutory immunity from tort liability provided in 15 U.S.C. § 78kkk(d) is wholly inapplicable to petitioners' claims. This Court should grant this petition to correct the Court of Appeals' error in this important regard.

IV.
THE COURT OF APPEALS' INTERPRETATION OF SIPA CONFLICTS WITH THIS COURT'S AND OTHER COURTS OF APPEALS' RECOGNITION OF JUDICIAL DISCRETION IN AWARDING INTEREST AND IS CONTRARY TO FEDERAL STATUTE

The decision below did not state that the District Court abused its discretion in ordering SIPC to pay interest to petitioners. The Court of Appeals also did not distinguish between the standards for awarding prejudgment interest and awarding post-judgment interest. These two omissions in the Court of Appeals' analysis clearly set its decision at odds with this Court, with other circuit courts and with a federal statute.

The general rule, in cases arising under federal law, is that absent a statutory provision, the award of prejudgment interest rests in the sound discretion of the trial court. *See, e.g., Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150 (2d Cir. 1984); *Cargill, Inc. v. Taylor Towing Service, Inc.*, 642 F.2d 239 (8th Cir. 1981); *United States v. California State Board of Equalization*, 650 F.2d 1127 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982); This Court recognized the general rule in *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941), by stating that "in the absence of any controlling statutory regulation, the trial court is as competent to determine the amount of interest for delay as any other item of damage."

313 U.S. at 296 (citations omitted).

The Court of Appeals below held that because SIPA only authorizes SIPC to advance money to the trustee to satisfy a customer's "net equity" claim and because the definition of "net equity" does not provide for interest, SIPA prohibits a court from balancing the equities and ordering SIPC to pay interest. This Court and other circuit courts specifically allow a district court to award interest where a statute, such as SIPA, is silent on the issue of interest payments. *See, e.g., Billings v. United States*, 232 U.S. 261 (1914); *Rodgers v. United States*, 332 U.S. 371 (1947); *Zerman v. Jacobs*, 751 F.2d 82 (2d Cir. 1984). By implying a prohibition on interest awards where Congress has not addressed the subject, the Court of Appeals' opinion stands in conflict with the general rule applied by this Court and by many other circuit courts. Further, this "net equity" limitation on interest conflicts in principle with the ruling of the Third Circuit Court of Appeals in *Howmet Aluminum Corp. v. Hartford Accident & Indemnity Co.*, 665 F.2d 476 (3d Cir. 1981), in which the

court awarded interest resulting in total claims exceeding insurance policy limits.

In addition, by failing to distinquish between prejudgment and post-judgment interest, the Court of Appeals ignored 28 U.S.C. §1961(a) (1982). This provision states explicitly that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." SIPC delayed for several months before paying petitioners after final judgment in the controlling Pine Street test case. The Court of Appeals' failure to award even post-judgment interest is directly contrary to this federal statute and to other cases too numerous to cite.

CONCLUSION

Taken as a whole, the decision below gives SIPC total immunity from customer claims for either prejudgment or post-judgment interest and thus, encourages SIPC to delay paying customer claims. This result undermines the clear purpose of SIPA. Moreover, the analysis applied by the Court of Appeals in reaching this result conflicts with equitable principles applied by this Court and other circuit courts. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

ROBERT D. TUKE
FARRIS, WARFIELD & KANADAY
Nineteenth Floor
Third National Financial Center
Nashville, Tennessee 37219
(615) 244-5200

Counsel for petitioners

APPENDIX A

NOS. 85-5132 & 85-5133
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SECURITIES INVESTOR PROTECTION CORPORATION, *Plaintiff*,	)	
V.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC., *Defendant*,	)	
SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
V.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC., *et al.*, *Defendants*,	)	
PINE STREET BAPTIST CHURCH, *et al.*, *Claimants-Appellees*,	)	
V.	)	
SECURITIES INVESTOR PROTECTION CORPORATION, *Defendant-Appellant*, FRED D. BRYAN, *Trustee-Appellee.*	)	

Decided and Filed April 23, 1986

Before: KENNEDY and RYAN, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

CORNELIA G. KENNEDY, Circuit Judge.

This case arises out of the liquidation of Ambassador Church Finance/Development Group, Inc. ("Ambassador") under the Securities Investor Protection Act of 1970 ("SIPA"), as amended, 15 U.S.C. §§ 78aaa-78lll.[1] The SIPA created defendant-appellant, Securities Investor Protection Corporation ("SIPC"), and established the "SIPC Fund" to provide for the orderly liquidation of failed securities brokerage firms and for the financial protection of their customers. Under the SIPA, the SIPC maintains the SIPC Fund by levying assessments on almost all brokerage firms. When necessary, the SIPC satisfies the claims of the "customers" of a bankrupt broker-dealer for cash or securities out of the SIPC Fund.[2]

Acting upon the application of the Securities and Exchange Commission ("SEC"), the United States District Court for the Middle District of Tennessee appointed trustee-appellee, Fred D. Bryan ("the trustee"), as temporary receiver of Ambassador on November 7, 1974. On December 17, 1974, the District Court found that Ambassador's customers needed the protections of the SIPA and appointed Bryan as trustee to supervise Ambassador's liquidation. In January 1975, the trustee sent a notice to Ambassador's customers, including plaintiffs-appellees, instructing the customers to file their claims with the trustee. Plaintiffs-appellees promptly filed their claims.

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[1] In the Securities Investor Protection Act Amendments of 1978, Pub.L.No. 95-283, 92 Stat. 249, Congress extensively amended the SIPA. Since these amendments do not affect the issues in this case, we cite current law.

[2] At the time of this liquidation, the SIPA provided that the SIPC shall advance funds from the SIPC Fund to the trustee to satisfy customers' claims up to $50,000. The SIPC, however, would only satisfy customers' outstanding cash balances to the extent of $20,000 per customer. Today, the SIPC Fund protects customers' cash balances to $100,000 and total cash and securities to $500,000. 15 U.S.C. § 78fff-3(a)(1).

In April 1975, the trustee asked the SIPC to determine whether plaintiffs-appellees and other similarly situated claimants qualified as "customers" under 15 U.S.C. § 78lll (2). On May 7, 1975, the District Court entered an order authorizing and directing the SIPC to advance, from time to time, to the trustee sufficient funds to permit the trustee to satisfy the claims that customers had filed against the estate. On June 2, 1975, the SIPC advanced funds to the trustee to satisfy the claim of another customer which the SIPC did not dispute.

In April 1976, after considerable delay, the SIPC determined that plaintiffs-appellees did not qualify as "customers" under the SIPA. Plaintiffs-appellees filed objections to the SIPC rejection of their claims and asserted entitlement to "customer" status. The SIPC, the trustee and plaintiffs-appellees proceeded to litigate the claim of Pine Street Baptist Church ("Pine Street") as a "test case" on the issue whether plaintiffs-appellees qualified as "customers." On January 9, 1981, the District Court entered an order declaring that Pine Street qualified as a "customer" under the SIPA and was entitled to the full amount of its claim. *In re Atkeison*, 446 F.Supp. 844 (M.D. Tenn. 1977). SIPC and the trustee appealed. On May 27, 1982, this Court affirmed the District Court's decision. *Securities and Exchange Commission v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608 (6th Cir. 1982). When the trustee and the SIPC could not agree whether plaintiffs-appellees were entitled to interest during the previous proceedings, an additional delay occurred before the SIPC paid plaintiffs-appellees' "customer" claims. Finally, in November 1982, the SIPC advanced funds to the trustee to satisfy some of plaintiffs-appellees' claims. In February 1983, the SIPC advanced more funds to pay the remaining claims.

Plaintiffs-appellees brought this action directly against the SIPC to recover interest on their claims for the seven and one-half year period that the SIPC had delayed in paying their claims. The SIPC filed a motion to join trustee-appellee as a defendant. The District Court granted the motion. On November 5, 1984, the District Court, following a short trial, held that plaintiffs-appellees could recover interest directly from the SIPC. The District Court's order gave plaintiffs-appellees ten days to submit calculations showing the amount of interest due. On January 9, 1985, the District Court ordered the SIPC to pay the following amounts of interest directly to plaintiffs-appellees by January 31, 1985:

Pine Street Baptist Church	$12,515.61
First Church of the Nazarene	11,375.80
First Church of God	10,201.40
Theatre Nashville, Inc.	10,201.40
First Missionary Baptist Church	18,891.50
West Gate Baptist Church	48,136.24
Randall Memorial Free Will Baptist Church	48,594.40
Southmoor Baptist Church	14,690.07
Fairwinds Baptist Church	14,335.35
Westwood Baptist Church	35,107.25
Christian Schools, Inc.	8,602.17

The District Court awarded six percent per annum interest compounded annually for the period from June 2, 1975, the date when the SIPC first advanced money to the trustee to pay a "customer" claim that the SIPC did not contest, to March 31, 1979. The District Court awarded ten percent annual interest compounded annually for the period from April 1, 1979 to the date of judgment. The SIPC objected to any compounding of interest.

The SIPC raises three issues on appeal: (1) Whether the District Court erred in awarding interest to plaintiffs-appellees for the seven and one-half year period that the SIPC withheld funds from plaintiffs-appellees' claims as

"customers" under the SIPA; (2) Whether the District Court could award "compound interest;" and (3) Whether the District Court should have subrogated the SIPC to the rights of plaintiffs-appellees to the extent of any interest payments that the SIPC makes to plaintiffs-appellees.[3] For the reasons stated below, we hold that the District Court erred in awarding interest to plaintiffs-appellees. In light of this disposition, we do not consider the second and third issues.

Initially, we note that the District Court should have dismissed the action because plaintiffs-appellees, as customers, could not bring an action directly against the SIPC. In *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975), the Supreme Court held that the SIPA does not give customers of failing broker-dealers an implied private cause of action to compel the SIPC to take action under the SIPA. In this case, plaintiffs-appellees brought suit against the SIPC. Consequently, the District Court should have dismissed the action because the SIPA does not give plaintiffs-appellees a cause of action against the SIPC.

In addition, the SIPC argues that since liquidation under the SIPA parallels a bankruptcy proceeding, the District Court could award interest against Ambassador's estate only if the estate's assets were sufficient to satisfy the principal amount of all valid claims against the estate. Essentially, a liquidation under the SIPA is a bankruptcy proceeding. Title 15 U.S.C. 78fff(b) provides:

> To the extent consistent with the provisions of this chapter, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of

[3] Trustee-appellee, Fred D. Bryan, argues on behalf of the estate's creditors that the District Court properly refused to subrogate SIPC to plaintiffs-appellees' rights to the extent of any interest payments that the SIPC makes to plaintiffs-appellees.

> chapter 7 of Title 11. For the purposes of applying such title in carrying out this section, a reference in such title to the date of filing of the petition shall be deemed to be a reference to the filing date under this chapter.

Under the bankruptcy law, with certain exceptions not applicable in this case, a court cannot award post-petition interest against the debtor's estate unless a surplus exists.[4] In *Nicholas v. United States*, 384 U.S. 678, 86 S.Ct. 1674, 16 L.Ed.2d 853 (1966), the Supreme Court stated: "It is a well-settled principle of American bankruptcy law that in cases of ordinary bankruptcy, the accumulation of interest on claims against a bankrupt estate is suspended as of the date the petition in bankruptcy is filed." *Id.* at 682, 86 S.Ct. at 1678 (citation omitted). In *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 163, 67 S.Ct. 237, 240, 91 L.Ed. 162 (1946), the Supreme Court explained the reason for the rule:

> Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment — a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved.

Furthermore, the rule reflects "the broad equitable principle that creditors should not be disadvantaged *vis-a-vis* one another by legal delays attributable solely to the time-consuming procedures inherent in the administration of the bankruptcy laws." *Nicholas v. United States*, *supra* at 683, 86 S.Ct. at 1679 (footnote omitted). The SIPC

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[4] Only three exceptions exist to the general rule against post-petition interest on claims against a bankrupt debtor. First, courts allow interest where the allegedly bankrupt debtor ultimately proves solvent. Second, courts allow interest to secured creditors when the secured property generates income. Third, courts have awarded interest on secured claims when the value of the security exceeds both the principal and interest due. *In re Caudle*, 13 B.R. 29, 33 (Bankr.W.D. Tenn. 1981).

reasons that since the debtor's estate is insolvent, the District Court could not award interest on plaintiffs-appellees' claims. We agree.

Furthermore, 15 U.S.C. § 78fff-3 provides the exclusive authority for the SIPC to advance funds to a trustee in a liquidation proceeding.[5] Although 15 U.S.C. § 78fff-3(b)

[5] Title 15 U.S.C. § 78fff-3 provides:

(a) Advances for customers' claims. — In order to provide for prompt payment and satisfaction of net equity claims of customers of the debtor, SIPC shall advance to the trustee such moneys, not to exceed $500,000 for each customer, as may be required to pay or otherwise satisfy claims for the amount by which the net equity of each customer exceeds his ratable share of customer property, except that —

(1) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is a claim for cash, as distinct from a claim for securities, the amount advanced to satisfy such claim for cash shall not exceed $100,000 for each such customer;

(2) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(3) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is satisfied by the delivery of securities purchased by the trustee pursuant to section 78fff-2(d) of this title, the securities so purchased shall be valued as of the filing date for purposes of applying the dollar limitations of this subsection;

(4) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any net equity claim of a customer who is a general partner, officer, or director of the debtor, a beneficial owner of five per centum or more of any class of equity security of the debtor (other than a nonconvertible stock having fixed preferential dividend and liquidation rights), a limited partner with a participation of five per centum or more in the net assets or net profits of the debtor, or a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the debtor; and

(5) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy any net equity claim of any customer who is a broker or dealer or bank, other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor or from the books and records of a broker or dealer or bank, or otherwise, that the net equity claim of such broker or dealer or bank against the debtor arose out of transactions for customers of such broker or dealer or bank (which customers are not themselves a broker or dealer or bank or a person described in paragraph (4)), in which event each such customer of such broker or dealer or bank shall be deemed a separate customer of the debtor.

To the extent moneys are advanced by SIPC to the trustee to pay or otherwise satisfy the claims of customers, in addition to all other rights it may have at law or in equity,

gives the SIPC authority to advance administrative expenses to the trustee and § 78fff-3(c) allows the SIPC to make certain discretionary advances, § 78fff-3(a) governs the SIPC's advances to the trustee to satisfy the "net equity claims of customers of the debtor." Title 15 U.S.C. § 78lll (11) defines "net equity" as:

> the dollar amount of the account or accounts of a customer, to be determined by —
>
> (A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer (other than customer name securities reclaimed by such customer); minus
>
> (B) any indebtedness of such customer to the debtor on the filing date; plus
>
> (C) any payment by such customer of such indebtedness to the debtor which is made with the approval of the trustee and within such period as the trustee may determine (but in no event more than

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SIPC shall be subrogated to the claims of such customers with the rights and priorities provided in this chapter, except that SIPC as subrogee may assert no claim against customer property until after the allocation thereof to customers as provided in section 78fff-2(c) of this title.

(b) Other advances. — SIPC shall advance to the trustee —

(1) such moneys as may be required to carry out section 78fff-2(e) of this title; and

(2) to the extent the general estate of the debtor is not sufficient to pay any and all costs and expenses of administration of the estate of the debtor and of the liquidation proceeding, the amount of such costs and expenses.

(c) Discretionary advances. — SIPC may advance to the trustee such moneys as may be required to —

(1) pay or guarantee indebtedness of the debtor to a bank, lender, or other person under section 78fff-1(b)(2) of this title;

(2) guarantee or secure any indemnity under section 78fff-2(f) of this title; and

(3) purchase securities under section 78fff-2(d) of this title.

> sixty days after the publication of notice under section 78fff-2(a) of this title).
>
> In determining net equity under this paragraph, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers.

Since the definition of "net equity" does not include interest, we hold that the SIPA does not authorize the SIPC to pay interest, either to the trustee or directly to the debtor's customers. As the District Court noted in its opinion, "Congress could have specifically provided for payment of interest out of the funds of SIPC, but did not do so."

The District Court, however, relied on *First Empire Bank-New York v. Federal Deposit Insurance Corporation*, 572 F.2d 1361 (9th Cir.), *cert. denied*, 439 U.S. 919, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978), when ordering the SIPC to pay interest directly to plaintiffs-appellees. In *First Empire*, the Ninth Circuit allowed the appellants to recover the interest accruing on each letter of credit from the date the letter of credit matured, the dates on which the FDIC would have made a ratable distribution if the FDIC had treated all the claims against the debtor bank ratably. The court recognized that the purpose of the general rule disallowing interest accruing after insolvency is to further the concept of ratable distribution. The court, however, concluded that the general rule did not apply because the FDIC had failed to make the "ratable dividend" that 12 U.S.C. § 194 required.

> [A] difference must be recognized between the case where interest accruing after insolvency is added to become a part of the claim itself and the case where interest is awarded in addition to the amount of the claim for failure of the receiver to pay the claim when it became due or to include the claim in a distribution in which it was entitled ratably to share.

Id. at 1372. The Ninth Circuit observed that in *Ticonic National Bank v. Sprague*, 303 U.S. 406, 411, 58 S.Ct. 612, 614, 82 L.Ed. 926 (1938) (citation omitted), the Supreme Court stated:

> It is in order to assure equality among creditors as of the date of insolvency that interest accruing thereafter is not considered. *But interest is proper where the ideal of equality is served, and so a creditor whose claim has been erroneously disallowed is entitled on its allowance to interest on his dividends from the time a ratable amount was paid other creditors.*

572 F.2d at 1372 (emphasis added by Ninth Circuit).

First Empire, however, does not apply to this case for two reasons. Initially, in *First Empire*, the FDIC, as receiver of the bankrupt bank, distributed virtually all of the debtor's assets to some creditors, while depriving other creditors their ratable share of the estate. In this case, the SIPC was not a trustee, receiver, or other fiduciary responsible for the liquidation of Ambassador's estate. Second, *First Empire* involved the National Bank Act, 12 U.S.C. § 194, which requires "ratable dividends." The SIPA, however, does not mention ratable dividends, distributions, or advances. Since the SIPA only protects customers' accounts to a maximum of $500,000 for total cash and securities but only $100,000 for cash, the SIPC often makes nonratable distributions from the SIPC Fund. Accordingly, we refuse to apply *First Empire* in the context of the SIPA in this case.

Finally, we note that 15 U.S.C. § 78kkk(c) provides that "[n]either SIPC nor any of its Directors, officers, or employees shall have any liability to any person for any action taken or omitted in good faith under or in connection with any matter contemplated by this chapter." Plaintiffs-appellees have not asserted any bad faith on the part of the SIPC in contesting their claims to "cus-

tomer" status. Consequently, 15 U.S.C. § 78kkk(c) excuses the SIPC from any obligation to pay interest under the circumstances of this case.

Accordingly, the District Court order awarding interest to plaintiffs-appellees is reversed. The case is remanded to the District Court for entry of an order dismissing the action.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SECURITIES INVESTOR PROTECTION CORPORATION	)	
	)	
v.	)	
	)	
AMBASSADOR CHURCH FINANCE DEVELOPMENT GROUP, INC.	)	
SECURITIES AND EXCHANGE COMMISSION	)	
	)	
v.	)	
	)	No. 74-471
AMBASSADOR CHURCH FINANCE DEVELOPMENT GROUP, INC., AND HENRY C. ATKEISON, JR.	)	No. 3-83-0541
PINE STREET BAPTIST CHURCH, *et al.*	)	
	)	
v.	)	
	)	
SECURITIES INVESTOR PROTECTION CORPORATION AND FRED D. BRYAN, TRUSTEE	)	

MEMORANDUM

After seven years of litigation, the plaintiffs won payment of their claims under the Securities Investor Protection Act (the Act). Securities Investor Protection Act of 1970, Pub. L. No. 91-598, 84 Stat. 1636 (1970) (current version at 15 U.S.C. §§ 78aaa *et seq.* (1978)). They now seek to recover interest on those claims directly from the Securities Investor Protection Corporation (SIPC). Whether they are entitled to do so appears to be an issue of first impression. In this court's opinion, they are.

The facts of this case are set forth fully in a prior memorandum. *See SIPC v. Ambassador Church Finance/Development Group, Inc.*, Civ. No. 74-471 (M.D. Tenn. January 9, 1981). They need be repeated only briefly here. On November 7, 1974, this court appointed Mr. Bryan temporary receiver for Ambassador Church Finance/Development Group (the debtor). On December 17, 1974, the court found the customers of the debtor were in need of the protections afforded by the Act and appointed Mr. Bryan trustee in charge of the debtor's liquidation. By February 1975, all the plaintiffs had filed their claims as customers under the Act. The amounts of these claims were never disputed. The plaintiffs' status as "customers" under the Act was disputed, however. *See* SIPA of 1970, § 6(c)(2)(A)(ii), 84 Stat. 1636, 1647-48 (1970). The plaintiffs objected to the trustee's rejection of their claims and filed suit. This court found that the plaintiffs were customers under the terms of the Act. *SIPC v. Ambassador Church Finance/Development Group, Inc., supra.* That judgment was affirmed on May 27, 1982. *S.E.C. v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608 (6th Cir. 1982). In August of 1982, the trustee requested SIPC to advance funds sufficient to satisfy the plaintiffs' claims with interest. In November of 1982 and

February of 1983, the SIPC advanced sufficient funds to pay the plaintiffs' claims without interest. [1]

The plaintiffs contend that it is only equitable that they be compensated for the loss of use of the monies they were rightfully entitled to all along. The SIPC argues that the Act does not authorize it to pay interest to customers. It asserts that a liquidation pursuant to the Act is essentially a bankruptcy proceeding, *see, e.g., Exchange National Bank v. Wyatt*, 517 F.2d 453 (2d Cir. 1975); *SIPC v. Charisma Securities Co p.*, 506 F.2d 1191, 1193 (2d Cir. 1974); SIPA of 1970, § 6(c), 84 Stat. 1636, 1647 (1970); that the general rule is that interest on a claim ceases to accrue upon institution of a bankruptcy proceeding, *Nicholas v. United States*, 384 U.S. 678, 685, 86 S. Ct. 1674, 16 L. Ed. 2d 853, 860 (1966); *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 163, 67 S. Ct. 237, 91 L. Ed. 162, 164 (1946), and that none of the exceptions to that rule are applicable.[2] So that this matter may be put in perspective, it should be made clear that there are no assets belonging to or emanating from the insolvent

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[1] In November of 1982, SIPC advanced the following amounts:

Pine Street Baptist Church	$13,250.00
First Church of the Nazarene	15,250.00
First Church of God	10,800.00
First Missionary Baptist Church	20,000.00
Theatre Nashville, Inc.	10,800.00
West Gate Baptist Church	20,000.00

In February of 1983, SIPC advanced the following amounts:

Randall Memorial Freewill Baptist Church	$50,000.00
Fair Winds Baptist Church	14,750.00
Southmoore Baptist Church	15,115.00
Westwood Baptist Church	22,000.00
Christian Schools, Inc., d/b/a Goodpasture Christian School	8,851.00

[2] There are two well-defined exceptions to the rule against post-petition interest on claims against a bankrupt debtor. Interest is allowed where the alleged bankrupt proves solvent. It is also allowed to a secured creditor where the security is either sufficient to pay interest and principal, or where it generates sufficient income to pay interest. *In re Caudle*, 13 B.R. 29, 33 (W.D. Tenn. 1981).

broker to pay interest or satisfy the claim. The claim made here for interest is a claim against the assets of SIPC.

The Act mandates the establishment of a fund by assessment of qualified brokers. The public, as well as Congress, is interested in the preservation of the solvency of this fund so that there will be stability in the securities industry. It is always possible that enough failures could take place to tax the existence of this fund without the additional burden of payment of interest on the claims filed and allowed. Congress was no novice in the administration of funds for the stability of industry. It established the FDIC for the banking industry. After many decades of experience with the FDIC it established the SIPC. Congress had to be aware of the benefits, as well as the dangers of administering a fund to stabilize an industry. It must have known that claims would be delayed due to differences of opinion about their classifications and character and that in all likelihood litigation would ensue which might postpone their payment for many years. It is unlikely that a brokerage firm can be liquidated without hybrid relationships between the securities dealers and the public which would result in peculiar claims. Congress could have specifically provided for payment of interest out of the funds of SIPC, but did not do so.

However, the Court in the case of *First Empire Bank v. Federal Deposit Insurance Corp.*, 572 F.2d 1361 (9th Cir.), *cert. denied*, 439 U.S. 919, 99 S. Ct. 293, 58 L. Ed. 265 (1978), added a new dimension to the administration of claims under the government insurance funds. In that case the Court discussed the cases of *White v. Knox*, 111 U.S. 784, 4 S. Ct. 686, 28 L. Ed. 603 (1884); *Armstrong v. American Exchange National Bank*, 133 U.S. 433, 10 S. Ct. 450, 33 L. Ed. 747 (1890), and *Ticonic National Bank v. Sprague*, 303 U.S. 406, 58 S. Ct. 612, 82 L. Ed. 926 (1983). These cases

dealt with the allowance of interest on claims due from a receiver of an insolvent bank. After consideration, the Court held that the FDIC was required to accord equal treatment among creditors. Furthermore, because a ratable distribution was not made, the omitted creditors were permitted to recover interest from the date on which distribution would have been made had all claims been treated ratably.

If we apply the same equitable doctrine to the requirement that SIPC was required to treat claimants of like class equally, then, absent such treatment, interest should accrue. Thus, if all similar claims were paid at a certain date, then interest would accrue from that date until claims of the same class were paid. This date is June 2, 1975. Thus the claimants are entitled to statutory interest from June 2, 1975, to date. The court feels that this is an equitable solution.

The SIPC contends that even if it is liable for customer claims for cash no interest could ever accrue on customer claims for securities. In this case plaintiffs West Gate Baptist Church, Randall Memorial Free Will Baptist Church, and Westwood Baptist Church recovered claims for securities rather than cash. Like the other plaintiffs, they had delivered their bonds to the debtor so that it could sell them to the public. The debtor had informed the three plaintiffs that it had not been able to sell their bonds; thus, on the filing date of these proceedings, the three thought their accounts contained bonds rather than cash. *See* SIPA of 1970 § 6(c)(2)(B) and (f)(1), 84 Stat. 1636, 1649, 1651 (1970). Based on these facts, the SIPC concurred in the trustee's conclusion that their claims should be treated as ones for securities rather than cash.

Though somewhat confusing, the SIPC's attempt to distinguish claims for cash from those for securities appears to be based on two theories. The first is that the three

plaintiffs were only entitled to receive securities, therefore no interest can accrue on their claims. Although no explanation is provided for this conclusion, one might support it by arguing that Congress had no intention of insuring investors against market fluctuations. *See S.E.C. v. Albert & Maguire Securities Co., Inc.*, 560 F.2d 569, 572 (3d Cir. 1972). The second theory is that because the three plaintiffs received greater coverage than if their claims had been for cash it would be inequitable to allow interest on the larger recovery.

The first theory is flawed by mistakes of law and fact. The SIPC correctly observes that whenever a trustee can return securities to a customer in kind he is obligated to do so. SIPA of 1970, § 6(c)(2)(B), 84 Stat. 1636, 1649 (1970). With regard to Westgate, Westwood and Randall Memorial, the trustee obviously found it impractical to replace their securities with "securities of the same class and series of an issuer."[3] The SIPC's argument, therefore, reduces to a "but if" theory. Under the facts of this case, the trustee was obligated to compensate Westgate, Westwood and Randall Memorial with cash. They were deprived of the same thing all the other plaintiffs were — loss of use of their money. They are entitled to interest to compensate them for that loss the same as the other plaintiffs.[4]

---

[3] Presumably the debtor sold the plaintiffs' securities and converted the proceeds to his benefit.

[4] Perhaps the SIPC is suggesting that the trustee was obligated to use the funds advanced to him to purchase securities which would then have been delivered to the plaintiffs in satisfaction of their claims. If so, the court finds such a proposition wholly unconvincing. First the Act specifically provides that net equities for securities may be paid in cash. SIPA of 1970, § 6(f), 84 Stat. 1636, 1651 (1970). Second, why would Congress provide that securities shall be distributed "ratably," *id.*, unless it contemplated such a distribution would be made from an exhaustible supply such as the single and separate fund? *See also, id.* at § 6(c)(C), 84 Stat. 1686, 1649 (1970) (providing for proration of claims for "specifically identifiable securities." Finally, such a scheme would be economically and administratively inefficient.

The difference in the amount of coverage provided for securities as distinguished from cash claims does not indicate that interest cannot accrue on claims for securities. The Act as originally proposed provided for $50,000 coverage per customer without drawing any distinction between cash or securities claims. *See* 116 Cong. Rec. 40861, 40866 (1970). Senator McIntyre thought this amount was too large and proposed a reduction in coverage to $20,000 without distinction between cash or securities claims. 116 Cong. Rec. 40861, 40872. Senator Bennett proposed a compromise which provided $20,000 coverage for cash, the same amount the FDIC then provided on deposits in its covered institutions, and $50,000 coverage on securities. *Id.* In the ensuing debate, Senators Javits and Percy strenuously argued that $50,000 was a reasonable amount of coverage for investors. *Id.* at 40873-77. Thus, the difference in the amount of coverage provided for securities and cash claims represents the considered judgment of Congress as to what was reasonable. It in no way suggests that it would be inequitable to award interest on a securities claim.

The SIPC asserts if it is required to pay interest its rights of subrogation entitle it to reimbursement for those payments from the debtor's estate. The SIPC is subrogated to all customer claims paid with advances from its fund. SIPA of 1970, § 6(f), 84 Stat. 1636, 1651 (1970). In most cases, customers' claims arise from the debtor's defalcations. In this case, however, the customers' claims arose from the SIPC's actions, not the debtor's. It was the SIPC that made the decision to challenge the plaintiffs' status as customers. Granted, the trustee concurred in that decision, but the proof at trial demonstrated that it would not have made a difference

had he not done so. The SIPC alone controlled its fund. Its actions caused the plaintiffs' loss; thus, its right of subrogation is against itself, not the trustee.

An appropriate order will be entered.

/s/ L. CLURE MORTON

L. Clure Morton
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SECURITIES INVESTOR PROTECTION CORPORATION	)	
v.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC.	)	
SECURITIES AND EXCHANGE COMMISSION	)	
v.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC., AND HENRY C. ATKEISON, JR.	)	No. 74-471 No. 3-83-0541
PINE STREET BAPTIST CHURCH *et al*	)	
v.	)	
SECURITIES INVESTOR PROTECTION CORPORATION AND FRED D. BRYAN, TRUSTEE	)	

ORDER

In accordance with the memorandum contemporaneously filed, judgment is entered in favor of the plaintiffs. The plaintiffs shall, within ten (10) days, submit to the

court the calculations of the interest due them as set forth in the memorandum.

This case is closed.

/s/ L. CLURE MORTON

L. Clure Morton
Senior U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SECURITIES INVESTOR PROTECTION CORPORATION	)	
v.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC.	)	
SECURITIES AND EXCHANGE COMMISSION	)	
v.	)	No. 74-471
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC., AND HENRY C. ATKEISON, JR.	)	No. 3-83-0541
PINE STREET BAPTIST CHURCH, *et al.*	)	
v.	)	
SECURITIES INVESTOR PROTECTION CORPORATION AND FRED D. BRYAN, TRUSTEE	)	

MEMORANDUM

This memorandum briefly explains the formula used to compute the awards made in the accompanying order.

On November 5, 1984, judgment was entered granting the plaintiffs interest on their judgments from June 2, 1975 at the statutory rate. *See* 28 U.S.C. § 1961. Prior to April 1, 1979, the maximum allowable statutory rate of prejudgment interest was six percent. Tenn. Code Ann. § 47-14-104 (1978 Supp.). Therefore, from June of 1975 to March 31, 1979, interest has been calculated at the rate of six percent per annum compounded annually. From April 1, 1979, to the date of judgment, interest has been calculated at the rate of ten percent per annum compounded annually. Tenn. Code Ann. § 47-14-123 (1984). Post-judgment interest has been computed at the rate of ten percent per annum compounded annually. Tenn. Code Ann. § 47-14-121 (1984).[1]

The defendant objects to any compounding of interest. The statutes that authorize the payment of interest do not specify whether interest is to be compounded or not. In this court's opinion, interest must be compounded if the plaintiffs are to be fully compensated for the loss of use of their money. The defendant also requests that the court award less than the maximum allowable rate of interest because it litigated the plaintiffs' claims in good faith. As was noted in the court's prior memorandum, the defendants' good faith had no bearing on the court's decision to award the plaintiffs interest. That decision was made not to penalize the defendant, but to compensate the plaintiffs for the loss of use of money that was rightfully theirs. *See Schoen v. J. C. Bradford & Co.*, 667 S.W.2d 97, 101-102 (Tenn. Ct. App. 1984).

An appropriate order shall be entered.

/s/ L. CLURE MORTON

L. Clure Morton
Senior U.S. District Judge

[1] The Appendix attached to this memorandum contains a detailed illustration of the calculations used to arrive at the judgments.

APPENDIX

ILLUSTRATION OF CALCULATIONS USED TO ARRIVE AT JUDGMENTS

PINE STREET BAPTIST CHURCH

Principal: $13,250

Interest computed at 6% compounded annually from June 1, 1975, to March 31, 1979. Interest computed at 10% compounded annually from April 1, 1979 to present.

6/1/75 — 5/31/76	($13,250 x 6%)	=	$795.00
6/1/76 — 5/31/77	($14,045 x 6%)	=	842.70
6/1/77 — 5/31/78	($14,887.70 x 6%)	=	893.26
6/1/78 — 3/31/79	[($15,780.96 x 6%) x 5/6]	=	789.05
4/1/79 — 3/31/80	($16,570.01 x 10%)	=	1,657.00
4/1/80 — 3/31/81	($18,227.01 x 10%)	=	1,822.70
4/1/81 — 3/31/82	($20,049.71 x 10%)	=	2,004.97
4/1/82 — 10/31/82	[($22,054.68 x 10%) x 7/12]	=	1,286.52
Principal of $13,250 paid 11/82 leaving an unpaid balance of $23,341.20 − $13,250.00 = $10,091.20			
11/1/82 — 10/31/83	($10,091.20 x 10%)	=	$1,009.12
11/1/83 — 10/31/84	($11,100.32 x 10%)	=	1,110.03
11/1/84 — 1/31/85	[($12,210.35 x 10%) x 1/4]	=	305.26
Judgment due Pine Street as of 1/31/85:			12,515.61

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SECURITIES INVESTOR PROTECTION CORPORATION	)	
v.	)	
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC.	)	
SECURITIES AND EXCHANGE COMMISSION	)	
v.	)	No. 74-471
AMBASSADOR CHURCH FINANCE/ DEVELOPMENT GROUP, INC., AND HENRY C. ATKEISON, JR.	)	No. 3-83-0541
PINE STREET BAPTIST CHURCH, *et al.*	)	
v.	)	
SECURITIES INVESTOR PROTECTION CORPORATION AND FRED D. BRYAN, TRUSTEE	)	

ORDER

In accordance with the accompanying memorandum and the memorandum and order entered on November 5, 1984, in the above-styled case, it is ordered that the Secur-

ities Investor Protection Corporation pay the following amounts to the parties specified on January 31, 1985:

Pine Street Baptist Church	$12,515.61
First Church of the Nazarene	11,375.80
First Church of God	10,201.40
Theatre Nashville, Inc.	10,201.40
First Missionary Baptist Church	18,891.50
West Gate Baptist Church	48,136.24
Randall Memorial Freewill Baptist Church	48,594.40
Southmoor Baptist Church	14,690.07
Fair Winds Baptist Church	14,335.35
Westwood Baptist Church	35,107.25
Christian Schools, Inc.	8,602.17

It is so ORDERED.

/s/ L. CLURE MORTON

L. Clure Morton
Senior U.S. District Judge

APPENDIX D

STATUTES INVOLVED

28 U.S.C. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

15 U.S.C. § 78ccc. Securities Investor Protection Corporation

(b) Powers

In addition to the powers granted to SIPC elsewhere in this chapter, SIPC shall have the power —

> (1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any State, Federal, or other court; . . . .

15 U.S.C. § 78fff-3. SIPC advances

(a) Advances for customers' claims

In order to provide for prompt payment and satisfaction of net equity claims of customers of the debtor, SIPC shall advance to the trustee such moneys, not to exceed $500,000 for each customer, as may be required to pay or

otherwise satisfy claims for the amount by which the net equity of each customer exceeds his ratable share of customer property, except that —

(1) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is a claim for cash, as distinct from a claim for securities, the amount advanced to satisfy such claim for cash shall not exceed $100,000 for each such customer;

(2) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(3) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is satisfied by the delivery of securities purchased by the trustee pursuant to section 78fff-2(d) of this title, the securities so purchased shall be valued as of the filing date for purposes of applying the dollar limitations of this subsection;

(4) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any net equity claim of a customer who is a general partner, officer, or director of the debtor, a beneficial owner of five per centum or more of any class of equity security of the debtor (other than a nonconvertible stock having fixed preferential dividend and liquidation rights), a limited partner with a participation of five per centum or more in the net assets or net profits of the debtor, or a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the debtor; and

(5) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy any net equity claim of any customer who is a broker or dealer or bank, other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor or from the books and records of a broker or dealer or bank, or otherwise, that the net equity claim of such broker or dealer or bank against the debtor arose out of transactions for customers of such broker or dealer or bank (which customers are not themselves a broker or dealer or bank or a person described in paragraph (4)), in which event each such customer of such broker or dealer or bank shall be deemed a separate customer of the debtor.

To the extent moneys are advanced by SIPC to the trustee to pay or otherwise satisfy the claims of customers, in addition to all other rights it may have at law or in equity, SIPC shall be subrogated to the claims of such customers with the rights and priorities provided in this chapter, except that SIPC as subrogee may assert no claim against customer property until after the allocation thereof to customers as provided in section 78fff-2(c) of this title.

15 U.S.C. § 78ggg. SEC functions

(b) Enforcement of actions

In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

15 U.S.C. § 78kkk. Miscellaneous provisions

(c) Liability of SIPC and Directors, officers, or employees

Neither SIPC nor any of its Directors, officers, or employees shall have any liability to any person for any action taken or omitted in good faith under or in connection with any matter contemplated by this chapter.

15 U.S.C. § 78111. Definitions

(11) Net equity

The term "net equity" means the dollar amount of the account or accounts of a customer, to be determined by —

(A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer (other than customer name securities reclaimed by such customer); minus

(B) any indebtedness of such customer to the debtor on the filing date; plus

(C) any payment by such customer of such indebtedness to the debtor which is made with the approval of the trustee and within such period as the trustee may determine (but in no event more than sixty days after the publication of notice under section 78fff-2(a) of this title).

In determining net equity under this paragraph, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers.

Supreme Court, U.S.
FILED
AUG 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PINE STREET BAPTIST CHURCH, *et al.*,
Petitioners,

vs.

SECURITIES INVESTOR PROTECTION CORPORATION
and FRED D. BRYAN, TRUSTEE,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Of Counsel

MICHAEL E. DON
Deputy General Counsel

STEPHEN P. HARBECK
Associate General Counsel

THEODORE H. FOCHT
General Counsel
SECURITIES INVESTOR PROTECTION CORPORATION
900 Seventeenth Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 223-8400

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

This suit arises in a proceeding to liquidate the business of Ambassador Church Finance/Development Group, Inc. ("Debtor") under the Securities Investor Protection Act of 1970 ("SIPA"), which created Respondent Securities Investor Protection Corporation ("SIPC")[1]. Under SIPA the "customers" (as defined) of a bankrupt broker-dealer are a preferred class of creditors. Claims for cash or securities may be satisfied from the Debtor's estate in liquidation, supplemented within limits by SIPC's funds.

The Petitioners in this case, hereinafter referred to as the "Issuers", were issuers of securities who were held to be "customers" of the Debtor pursuant to a determination by the United States Court of Appeals for the Sixth Circuit.[2] SIPC then advanced the maximum allowable amount under SIPA to the trustee for the Debtor, on behalf of each Issuer. Subsequent

---

[1] 15 U.S.C. sections 78aaa *et seq.* (1982). The liquidation of the Debtor was conducted under SIPA as originally enacted in 1970. SIPA was amended by Pub. L. No. 95-283, 92 Stat. 249 (1978), Pub. L. No. 95-598, 92 Stat. 2549 (1978) and Pub. L. No. 96-433, 94 Stat. 1855 (1980). Because "these amendments do not affect the issues in this case," the Sixth Circuit below cited the current version of SIPA rather than the 1970 version. *SIPC v. Ambassador Church Finance/Development Group, Inc.* 788 F.2d 1208, 1209, n.1 (6th Cir. 1976). The Petitioners followed this convention in their Petition For A Writ of Certiorari (p.2. n.1.). SIPC will therefore cite to current law as well, making note of some linguistic changes which do not affect the result. Pursuant to this court's rule 28.1, SIPC states that it has no parent companies, subsidiaries, or affiliates.

[2] *SEC v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608 (6th Cir. 1982).

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to the receipt of funds advanced by SIPC to the trustee on their behalf, the Issuers filed the instant suit, seeking "interest" directly from SIPC. The principal question now presented to this Court is:

> Whether the Issuers may be paid interest in this liquidation proceeding, and if so, whether it may be paid directly by SIPC.

SIPC submits that the United States Court of Appeals for the Sixth Circuit correctly held that, "SIPA does not authorize the SIPC to pay interest, either to the trustee or directly to the debtor's customers. As the District Court noted in its opinion, 'Congress could have specifically provided for payment of interest out of funds of SIPC, but did not do so.' "[3]

The Sixth Circuit also held against petitioners for other independent reasons. Thus, in order for this Court to review the principal question presented, under circumstances where that question is not mooted by the other holdings below, it must also review the following two questions:

> Whether petitioners have an implied right of action against SIPC, arising under SIPA, where this Court held 11 years ago that no such right of action exists;
>
> Whether SIPC, which is statutorily immune from liability "for any action taken or omitted in good faith under or in connection with any matter contemplated by" SIPA, can be

---

[3] *SIPC v. Ambassador Church Finance/Development Group, Inc., (Pine Street Baptist Church v. SIPC)*, 788 F.2d 1208, 1212 (6th Cir. 1986).

held liable where (1) no evidence of lack of good faith was introduced at trial and (2) petitioners conceded at trial that SIPC had acted in good faith.

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The Issuers have admitted that SIPC litigated the issue of their "customer" status in good faith. SIPA section 15(c), 15 U.S.C. section 78kkk(c), is applicable. 23

The Sixth Circuit correctly construed *SIPC v. Barbour*. 25

The Issuers' reliance on 28 U.S.C. Section 1961(a) is misplaced. 27

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-79

PINE STREET BAPTIST CHURCH, *et al.*,
Petitioners,

vs.

SECURITIES INVESTOR PROTECTION CORPORATION
and FRED D. BRYAN, TRUSTEE,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Nature of the Case

As the Sixth Circuit noted in this case, "[e]ssentially, a liquidation proceeding under the SIPA is a bankruptcy proceeding." 788 F.2d 1208 at 1210 (6th Cir. 1986). It has been repeatedly held that the liquidation of a brokerage firm under SIPA is a bankruptcy proceeding for all prac-

tical purposes. *See, e.g., Exchange National Bank v. Wyatt*, 517 F.2d 453 (2d Cir. 1975); *SIPC v. Charisma Securities Corp.*, 506 F.2d 1191, 1193 (2d Cir. 1974); *SEC v. Aberdeen Securities Corp.*, 480 F.2d 1121, 1128 (3d Cir. 1973), *cert. denied.*, 414 U.S. 1111 (1973); *SEC v. Wick*, 360 F.Supp. 312 (N.D. Ill. 1973). SIPA section 6(b), 15 U.S.C. section 78fff(b) requires that a liquidation proceeding under SIPA be conducted "in accordance with, and as though it were being conducted under chapters 1, 3 and 5 and subchapters I and II of chapter 7" of the Bankruptcy Code[4] which are not inconsistent with the provisions of SIPA. A trustee appointed in a SIPA proceeding has the same general powers and duties as a trustee in bankruptcy. SIPA section 7, 15 U.S.C. section 78fff-1.

Course of Proceedings, Disposition Below, and Facts

On November 7, 1974, the United States District Court for the Middle District of Tennessee appointed Fred D. Bryan as temporary receiver of the Debtor on the application of the Securities and Exchange Commission ("SEC") in its action for injunctive relief. On December 17, 1974, on the application of SIPC, that court found that the customers of the Debtor were in need of the protections afforded by SIPA and appointed Mr. Bryan as trustee for the liquidation of the Debtor's business.

The Issuers, the Petitioners herein, were claimants who filed their respective claims with the trustee. The trustee rejected them as the claims of "customers" of the Debtor, as that term is defined in SIPA section 16(2), 15 U.S.C. section 78*lll*(2), but allowed them as general creditor claims. The basis for this rejection was that the Issuers had dealt with the Debtor as issuers of securities seeking to raise

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[4] The former Bankruptcy Act, 11 U.S.C. 1 *et seq.* controls this case, rather than the Bankruptcy Code (Bankruptcy Reform Act, Pub. L. No. 95-598 (1978)) which superseded the Act. Just as recent amendments to SIPA do not affect the result (*supra*, note 1), neither does enactment of the new Code.

capital, as opposed to persons seeking to invest or trade in securities. The Issuers filed objections to the trustee's determinations, asserting entitlement to "customer" status.

The trustee, SIPC, and the Issuers agreed to proceed to litigate one of the objections so as to obtain a judicial determination as to whether such claims were eligible for protection as "customers" of the Debtor. After extensive pretrial proceedings, the trustee, SIPC, and one of the Issuers, Pine Street Baptist Church ("Pine Street"), stipulated to all of the facts surrounding the transactions between Pine Street and the Debtor.

On January 9, 1981, the District Court held that Pine Street was entitled to "customer" status under SIPA. The trustee and SIPC appealed that determination. On May 27, 1982, the United States Court of Appeals for the Sixth Circuit affirmed. *SEC v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608 (6th Cir. 1982).[5] As a result of the foregoing litigation, the Issuers' claims were allowed as "customer" claims.

Subsequently, the trustee requested SIPC to advance sufficient funds to satisfy the Issuers' claims with interest. SIPC thereafter advanced funds to the trustee to pay the Issuers' claims as allowed,[6] without interest.

Subsequent to their receipt of the funds advanced by SIPC to the trustee, the Issuers filed an adversary pro-

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[5] The Sixth Circuit carefully limited its opinion to the facts before it, stating that "[w]e do not decide whether an issuer of securities who deals with an investment banker or underwriter only in more traditional ways may be a 'customer' under the Act." 679 F.2d 608 at 613.

[6] Since the claims of two of the Issuers, Randall Memorial Free Will Baptist Church and Westgate Baptist Church were over the then existing $50,000 limit on SIPC advances specified in SIPA, SIPC advanced only $50,000 for each of those two claims. The limits of protection were raised at a later date.

ceeding within the liquidation proceeding, seeking interest directly from SIPC. Trial was held on June 13, 1984. The District Court, by a Memorandum and an Order dated November 5, 1984, held that the Issuers were entitled to interest directly from SIPC. The District Court noted that Congress "must have known" that litigation would ensue which might postpone payment of claims "for many years," and that "Congress could have specifically provided for payment of interest out of the funds of SIPC, but did not do so." Memorandum, November 5, 1984, p. 5. Nevertheless, applying "equity," and without reference to SIPA, the District Court determined that "statutory interest" was due from June 5, 1975, the date by which all other customer claims had been paid. Memorandum, November 5, 1984, p. 6. The District Court's Order of November 5, 1984 did not specify the amount of interest, but did state: "This case is closed." Both SIPC and the Issuers appealed the November 5 Order. Both sides submitted proposals to the District Court as to the amount of interest.

On January 9, 1985, by a Memorandum and an Order, the District Court detailed the amount of interest each Issuer was to be awarded as of January 31, 1985. SIPC appealed the January 9, 1985 Order; the Issuers withdrew their appeal from the November 5, 1984 Order.

The Sixth Circuit reversed the District Court, for four independent reasons.[7] First, noting that this is a bankruptcy proceeding for all practical purposes, the Sixth Circuit held that interest is not allowable under bankruptcy law unless the Debtor's estate generates a surplus. Since the Debtor's estate was insolvent, no interest would accrue in this case. *SIPC v. Ambassador Church Finance Development Group, Inc.*, 788 F.2d 1208, at 1210-1211 (9th Cir. 1986).

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[7] The Sixth Circuit did not present its reasons in the sequence given here.

Second, the Sixth Circuit held that in a SIPA proceeding, SIPA section 9, 15 U.S.C. section 78fff-3 provides the *exclusive* means for SIPC to advance funds to a trustee on account of a customer's "net equity" as defined in SIPA section 16(11), 15 U.S.C. section 78*lll*(11). The court stated that "[s]ince the 'net equity' definition does not include interest, we hold that SIPA does not authorize the SIPC to pay interest, either to the trustee or directly to the debtor's customers." 788 F.2d 1208, at 1212.

Third, the Sixth Circuit noted that the Issuers did not assert that SIPC had denied their claims to customer status in bad faith. Consequently, the court held that SIPA section 15(c), 15 U.S.C. section 78kkk(c), "excuses SIPC from any obligation to pay interest under the circumstances of this case." 788 F.2d 1208, at 1213.

Fourth, citing *SIPC v. Barbour*, 421 U.S. 412 (1975), the Sixth Circuit held that the District Court should have dismissed the action, because "SIPA does not give customers of failing broker-dealers an implied private cause of action to compel SIPC to take action under the SIPA." 788 F.2d 1208, at 1210.

As noted above, the Debtor's general estate is insolvent, and the trustee was not able to recover any assets for the fund of "customer property" as defined in SIPA section 16(4), 15 U.S.C. section 78*lll*(4). There is, consequently, no surplus in either the general estate or the fund of "customer property."[8] (Testimony of Fred Bryan, Trustee, Transcript p. 37, l.13-25).

SUMMARY OF ARGUMENT

The Issuers have failed to present an issue which is worthy of review by this court. This court should not grant

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[8] Prior to 1978, SIPA referred to a "single and separate fund." The 1978 amendments altered this concept to "customer property," which encompassed a broader range of assets than the single and separate fund.

the Petition for a Writ of Certiorari in this case for the following reasons.

1. The Sixth Circuit simply followed two centuries of consistent precedent which holds that interest is not payable in bankruptcy, absent a surplus in the bankruptcy estate. SIPC's presence in the bankruptcy does not alter this result. Had any other customer or general creditor (as distinguished from SIPC) objected to "customer" status for the Issuers, the Issuers would have been put to the same test in litigation. There is simply no law which thereafter permits the Issuers to sue the objecting creditor for damages or interest.

2. SIPA sets forth a "net equity" definition, which is a precise formula as to the amount a "customer" may receive in a SIPA proceeding. Congress did not provide for interest to be paid on a customer's net equity and this court cannot alter that precise formula established by Congress.

3. The Sixth Circuit correctly held that there is no private right of action implied in SIPA to circumvent the limitations of how much a customer may receive from SIPC.

4. The Sixth Circuit was also correct in holding that since there was no allegation at trial that SIPC disputed the Issuers' "customer" status in bad faith, SIPA section 15(c), 15 U.S.C. section 78kkk(c), prohibited a suit for interest by the Issuers.

5. There is no conflict among the United States Circuit Courts of Appeals concerning any holding of the Sixth Circuit in this case, nor is there any conflict with prior decisions of this Court.

ARGUMENT

I. The Principal Question Presented Is A Well Settled Point Of Law Which Is Not Worthy Of Review By This Court. Interest Is Not Allowable Against SIPC. Interest Is Only Allowable Against The Debtor's Estate, And Then Only If There Is A Surplus After Payment Of All Valid Claims.

As A General Rule, Interest Does Not Accrue After The Date Of Bankruptcy.

How a debtor's assets are to be distributed, and the circumstances under which interest may be allowed against a debtor's estate, are determined by federal rather than state law. *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946); *In re Leeds Homes, Inc.*, 332 F.2d 648, 649 (6th Cir. 1964).

The *Vanston Bondholders* case states the prevailing legal principle involved in this case: "[I]nterest on the debtor's obligations ceases to accrue at the beginning of the proceeding." 329 U.S. at 163. This Court stated the reason for this rule as follows:

> Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved.

Id. As stated by Mr. Justice Holmes:

> The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up.

Sexton v. Dreyfus, 219 U.S. 339, 344 (1911). As early as 1911, the *Sexton* court stated: "For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission." *Id.* The opinion in *Sexton* demonstrates the deep historical roots of this rule. The court stated "We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state. No one doubts that interest on unsecured debts stops." *Id. See also, Thomas v. Western Car Co.*, 149 U.S. 95, 116-117 (1893).

The rationale of *Sexton* reflects "the broad equitable principle that creditors should not be disadvantaged *vis-a-vis* one another by legal delays attributable solely to the time-consuming process inherent in the administration of the bankruptcy laws." *Nicholas v. United States*, 384 U.S. 678, 683 (1966).[9] The long-standing rule against post-bankruptcy interest is implicit in the Bankruptcy Act. *City of New York v. Saper*, 336 U.S. 328, 332 (1949).

This "black letter law," that interest on unsecured debts stops on the date of bankruptcy, has been consistently recognized. *See, e.g., In re King Resources Co.*, 528 F.2d 789 (10th Cir. 1976); *State Board of Equalization v. Stodd*, 500 F.2d 1208 (9th Cir. 1974); *In re Time Sales Finance Corp.*, 491 F.2d 841 (3d Cir. 1974); *In re Kerber Packing Co.*, 276 F.2d 245 (7th Cir. 1960); *In re Magnus Harmonica*

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[9] It is indicative of the weakness of the Issuers' argument that, notwithstanding the Sixth Circuit's direct reliance on this Court's opinions in the *Vanston Bondholders* and *Nicholas* cases, *see* 788 F.2d 1208, at 1211, the Issuers do not even mention them in their Petition to this Court.

Corp., 262 F.2d 515 (3d Cir. 1959); *In re Chantler Baking Co.*, 436 F.Supp. 169 (W. D. Pa. 1977).

In *Jamison v. Federal Deposit Insurance Corporation*, 149 F.2d 199, 200 (5th Cir. 1945), the court applied the prevailing law to an insured bank:

> The general rule is that where the assets of an insolvent bank in receivership are more than sufficient to pay all debts, then the creditors are allowed dividends to pay the interest due from the debtor bank, but where the assets are not sufficient to pay the principal of all debts, interest on general claims will not be computed for the period after the receiver took control. In measuring the share of each creditor in the fund, interest beyond the date of suspension is not calculated. This rule was the outgrowth of the established principles that the rights of creditors in assets are fixed as of the date said assets are transferred by operation of law to a trustee for creditors; and that *the delay in distribution is an act of the law and a necessary incident to the settlement of the estate, for which delay no interest by way of damages accrues.* [Emphasis supplied; footnotes omitted.]

While federal law provides the rule of decision, general state law is in accord. Thus, in *Farish v. Holley*, 244 Ala. 19, 12 So. 2d 88, 92 (Ala. 1943) the court held that the creditors of an insolvent bank in liquidation could not be penalized by forcing the estate to pay interest where the defunct bank had litigated the validity of a claim and lost.[10]

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[10] The court stated:

Delay in the payment of a claim against an insolvent bank in liquidation is not ground for allowing interest thereon where it is occasioned by litigation over the right of a claim to a preference. The defunct bank has a right to the litigation of questions involved in a claim made

The rule in *Farish* is designed to allow creditors to challenge questionable claims against an estate. That rationale has seen application in this liquidation.[11]

The decision of the Sixth Circuit conforms with ordinary bankruptcy law as applied to a SIPA proceeding. Had any customer or general creditor (as distinguished from SIPC) objected to "customer" status, the Issuers would have been put to the same test in litigation. Had the Issuers emerged successfully, there is simply no law which would permit them to sue the objecting creditor for damages or interest. The Issuers cite no case to the contrary. The Sixth Circuit simply recognized this standard rule.

A recent pronouncement on the subject of postpetition interest under the Bankruptcy Act (as distinguished from the Bankruptcy Code) is found in *Debentureholders Protective Committee of Continental Investment Corporation v. Continental Investment Corporation*, 679 F.2d 264 (1st Cir. 1982). In that case, the court adhered to the rule in *Vanston Bondholders, supra*, concerning interest:

> If CIC were *insolvent*, the indenture provision allowing the post-petition interest on the installments which fell due either before or after the petition was filed would not be enforceable, regardless of State law. *Vanston*, 329 U.S. p. 159 lines 23-24, pp. 163-166, 67 S.Ct. p. 238, pp. 240-41. The federal bankruptcy rule, derived from English law, provides that in the case of *insolvent*

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against it, and the general creditors should not be penalized because of the exercise of this prerogative. *Id.*

[11] Thus, the trustee and SIPC *successfully* prevented one claimant in this proceeding, Geraldine Burns, from asserting customer status. *SEC v. Ambassador Church Finance/Development Group, Inc.*, 446 F.Supp. 844 (M.D.Tenn. 1977). The effect of this was to prevent Ms. Burns from sharing in the "single and separate fund" (now known as "customer property") which is divided, pro rata, among all persons (such as the Issuers) who successfully assert "customer" status.

> debtors interest, whether stipulated in a contract or not, stops at the moment the petition in bankruptcy is filed. *Sexton v. Dreyfus*, 219 U.S. 339, 344, 31 S.Ct. 256, 257, 55 L.Ed. 244 (1911); *American Iron Co. v. Seaboard Air Line*, 233 U.S. 261-267-268, 34 S.Ct. 502, 504-05, 58 L. Ed. 949 (1914); *See New York v. Saper*, 336 U.S. 328, 330, 69 S.Ct. 554, 555, 93 L. Ed. 710 (1949).

679 F.2d at 268-269. Since there is no question that the Debtor's estate is insolvent, the same rule applies here.

Exceptions To The General Rule Concerning Interest Are Not Applicable Here.

There are certain very limited exceptions to the general rule that post-petition interest is not allowable. *See, e.g., United States v. Bass*, 271 F.2d 129 (9th Cir. 1959). Those exceptions were well summarized by the Sixth Circuit in this case. 788 F.2d 1208, at 1211, n.4. After reciting the general rule that post-bankruptcy interest is not allowed, the court noted that interest can be awarded (l) where the debtor ultimately proves solvent, and generates a surplus, or (2) in certain instances where the creditor is a *secured* creditor and the security itself is either sufficient to pay interest or generates additional funds from which interest may be paid. *Id.* It is evident that these exceptions are inapplicable on the facts of this case. First, there will be no "surplus" in this Debtor's estate. The Debtor is hopelessly insolvent.[12] Second, the Issuers have no security interest in any asset.[13]

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[12] In cases arising under SIPA subsequent to the 1978 amendments to that statute, Bankruptcy Code section 726, 11 U.S.C. 726, was *specifically* incorporated into SIPA. *See* SIPA section 6, 15 U.S.C. section 78fff(e) (1980). Bankruptcy Code section 726 is a detailed program for the distribution of a debtor's general estate, including a provision for the payment of interest after all other claims are paid in full. Thus, in *In re OTC Net, Inc.*, 34 Bankr. 658, 661 (Bankr. D. Colo. 1983),

Congress did not enact SIPA in a fashion which permits annexation of SIPC's assets to the Debtor's estate. Nor is there any remotely analogous law which supports such a notion. Thus, for example, no cases support the proposition that the assets of the Federal Deposit Insurance Corporation (FDIC) or the Federal Savings and Loan Insurance Corporation (FSLIC) are considered part of an estate for the purpose of establishing a "surplus" out of which to pay post-petition interest under their respective statutory schemes. Indeed, the opposite is true. Implicit in the cited quotation from *Jamison v. Federal Deposit Insurance Corporation*, *supra*, p. 9, is the fact that any "surplus" must come from the *debtor's estate*—not from the FDIC.

The General Rule Applies To SIPA Proceedings.

The presence of SIPC in the insolvency does not change any of the foregoing. As noted above, SIPA proceedings are conducted as bankruptcy proceedings. The operative portions of SIPA were adopted, virtually word for word, from former section 60e of the Bankruptcy Act, 11 U.S.C. 96e. That section of the Bankruptcy Act was "intended to provide an exclusive procedure for determining conflicting claims between the broker's customers." *Tepper v. Chichester*, 285 F.2d 309, 311 (9th Cir. 1960). Section 60e defined "customers", who were entitled to share ratably in a "single and separate fund" (now known as "customer property") to the extent of their "net equity." SIPC is not an insurer. *SIPC v. Associated Underwriters, Inc.*, 423

SIPC recognized and supported payment of untimely filed claims *where there is a surplus in the estate*. SIPC has supported the payment of interest to claimants in cases where there has been a surplus. Unfortunately, this is not the case here.

[13] Even where the facts *might* allow a secured creditor to obtain interest from the security, the court will not always permit it. *In re Leeds Homes, Inc.*, 222 F.Supp. 20, 31 (E.D. Tenn.), *aff'd*, 332 F.2d 648 (6th Cir. 1964).

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F.Supp. 168, 171 (D. Utah 1975). SIPC advances merely augment "customer property" within statutory limits.

As noted, SIPA carried forward the basic framework of section 60e. However, in addition to the fund of "customer property," administered by the trustee of a defunct broker, SIPA created the "SIPC Fund." The "SIPC Fund," administered by SIPC, is funded by means of assessments on virtually all brokerage firms, SIPA section 4(a), 15 U.S.C. section 78ddd(a), and ultimately secured by a line of credit on the United States Treasury. SIPA sections 4(f), (g), and (h), 15 U.S.C. section ddd(f), (g), and (h). SIPC's obligation and authority to distribute the SIPC fund is strictly circumscribed by SIPA. SIPC advances to the trustee do not enhance the Debtor's estate. Further, to the extent of its advances to customers, SIPC is subrogated to all of the rights of the customers it pays. SIPA section 9(a), 15 U.S.C. section 78fff-3(a). Thus, any advances made by SIPC for customers increases SIPC's proportionate share of a debtor's estate by the amount of the advance. If interest was paid by SIPC, other creditors' claims would therefore be eligible for a smaller proportional share.

SIPC May Advance Money Only To Pay Customers' "Net Equity" Claims. "Net Equity", As Defined In SIPA, Does Not Include Interest.

As noted by the Sixth Circuit, 788 F.2d 1208, at 1211-1212, SIPA section 9, 15 U.S.C. section 78fff-3, is the *exclusive* provision which authorizes SIPC to advance funds in a liquidation proceeding.[14] SIPC may advance funds for

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[14] SIPA section 9, 15 U.S.C. section 78fff-3 provides:

SIPC ADVANCES

(a) ADVANCES FOR CUSTOMERS' CLAIMS

In order to provide for prompt payment and satisfaction of net equity claims of customers of the debtor, SIPC shall advance to the trustee

administrative expenses of the liquidation and for the completion of certain "open contractual commitments" under SIPA section 9(b) and (c), 15 U.S.C. section 78fff-3(b) and

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such moneys, not to exceed $500,000 for each customer, as may be required to pay or otherwise satisfy claims for the amount by which the net equity of each customer exceeds his ratable share of customer property, except that—

(1) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is a claim for cash, as distinct from a claim for securities, the amount advanced to satisfy such claim for cash shall not exceed $100,000 for each such customer;

(2) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(3) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is satisfied by the delivery of securities purchased by the trustee pursuant to section 78fff-2(d) of this title, the securities so purchased shall be valued as of the filing date for purposes of applying the dollar limitations of this subsection;

(4) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any net equity claim of a customer who is a general partner, officer, or director of the debtor, a beneficial owner of five per centum or more of any class of equity security of the debtor (other than a nonconvertible stock having fixed preferential dividend and liquidation rights), a limited partner with a participation of five per centum or more in the net assets or net profits of the debtor, or a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the debtor; and

(5) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy any net equity claim of any customer who is a broker or dealer or bank, other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor or from the books and records of a broker or dealer or bank, or otherwise, that the net equity claim of such broker or dealer or bank against the debtor arose out of transactions for customers of such broker or dealer or bank (which customers are not themselves a broker or dealer or bank or a person described in paragraph (4)), in which event each such customer of such broker

(c). But the only method by which SIPC may advance funds to satisfy or pay claims of any person eligible for "customer" status is clearly stated in SIPA section 9(a), 15 U.S.C. section 78fff-3(a). That section permits SIPC to advance funds to the trustee for satisfaction of "net equity claims of customers." The term "net equity" is, in turn, defined in SIPA section 16(11), 15 U.S.C. section 78*lll*(11).[15]

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or dealer or bank shall be deemed a separate customer of the debtor.

To the extent moneys are advanced by SIPC to the trustee to pay or otherwise satisfy the claims of customers, in addition to all other rights it may have at law or in equity, SIPC shall be subrogated to the claims of such customers with the rights and priorities provided in this chapter, except that SIPC as subrogee may assert no claim against customer property until after the allocation thereof to customers as provided in section 78fff-2(c) of this title.

(b) OTHER ADVANCES

SIPC shall advance to the trustee—

(1) such moneys as may be required to carry out section 78fff-2(e) of this title; and

(2) to the extent the general estate of the debtor is not sufficient to pay any and all costs and expenses of administration of the estate of the debtor and of the liquidation proceeding, the amount of such costs and expenses.

(c) DISCRETIONARY ADVANCES

SIPC may advance to the trustee such moneys as may be required to—

(1) pay or guarantee indebtedness of the debtor to a bank, lender, or other person under section 78fff-1(b)(2) of this title;

(2) guarantee or secure any indemnity under section 78fff-2(f) of this title; and

(3) purchase securities under section 78fff-2(d) of this title.

[15] SIPA section 16(11), 15 U.S.C. Section 78*lll*(11) provides:

NET EQUITY

The term "net equity" means the dollar amount of the account or accounts of a customer, to be determined by—

(A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase

"Net equity" requires the obligations of the Debtor to its customers to be quantified on the "filing date", SIPA section 16(7), 15 U.S.C. section 78*lll*(7). In this case, November 7, 1974 is the filing date. The relationship between a claimant and a debtor in a SIPA proceeding is measured at that one precise point in time. As was noted in *SEC v. Aberdeen Securities Co., Inc.*, 480 F.2d 1121, 1127 (3rd Cir. 1973) *cert. denied*, 414 U.S. 1111 (1973) the question thus posed is: What did the debtor owe the customer on the filing date? Interest, therefore, cannot be computed subsequent to that date against this Debtor's insolvent estate. This is wholly consistent with the law under the former Bankruptcy Act and the present Bankruptcy Code. *See Vanston Bondholders, supra* p. 7; 3A *Collier on Bankruptcy*, ¶63.16[1] (14th Ed. 1978).[16]

This Court has held that in interpreting SIPA, one must draw inferences "from the structure of SIPC." *SIPC v. Barbour*, 421 U.S. 412, 420 (1975). The only inference one

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on the filing date, all securities positions of such customer (other than customer name securities reclaimed by such customer); minus

(B) any indebtedness of such customer to the debtor on the filing date; plus

(C) any payment by such customer of such indebtedness to the debtor which is made with the approval of the trustee and within such period as the trustee may determine (but in no event more than sixty days after the publication of notice under section 78fff-2(a) of this title).

In determining net equity under this paragraph, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers.

[16] The law under the present Bankruptcy Code is virtually identical, in that post-petition interest is allowed a priority inferior to *all* other debts, and is paid only when to do otherwise would return money to the Debtor. *See* Bankruptcy Code section 726(a)(5)-(6). *See In re Twin Parks Limited Partnership*, 720 F.2d 1374, 1377 (4th Cir. 1983) which held that under the Bankruptcy Code, the vitality of the principles of *Vanston Bondholders, supra* p. 7, is undiminished.

can draw from SIPC's limited power to advance funds for certain purposes is that Congress did not authorize SIPC to advance funds except as specifically set forth in the statute. Under the doctrine of statutory construction *expressio unius est exclusio alterius*,

> when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. . . .'

National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974). As a consequence, the Sixth Circuit correctly held that, under SIPA, the District Court was not free to compel an award based on notions of equity. Any award of interest would do violence to the statute which controls this proceeding.

The Issuers seek to substitute their notion of equity for the equities mandated by Congress.

At bottom, the Issuers ask this court to ignore SIPA's explicit statutory provisions in favor of some supposed concept of equity. An equitable argument which seeks to avoid the plain mandate of SIPA will not prevail. As was noted in *SEC v. Packer, Wilbur & Co., Inc.*, 498 F.2d 978, 983 (2d Cir. 1974):

> [A]rguments based solely on the equities are not, standing alone, persuasive. If equity were the criterion, most customers and creditors of . . . the bankrupt, would be entitled to reimbursement for their losses. Experience, on the other hand, counsels that they will have to settle for much less. SIPA was not designed to provide full protection to all victims of a brokerage collapse.

Accord, SIPC v. Morgan, Kennedy & Co., Inc., 533 F.2d 1314 n. 4 (2d Cir. 1976), *cert. denied*, 426 U.S. 936 (1976).

Since Congress has limited what is to be advanced by SIPC to satisfy customer claims, the courts may not alter the statutory formula. It has been noted with respect to a claim in a liquidation under SIPA:

> Although this court, as it has been again and again reminded, may apply equitable principles in the exercise of its bankruptcy jurisdiction, *Bank of Marin v. England*, 385 U.S. 99 (1966), *Pepper v. Litton*, 308 U.S. 295 (1939), the exercise of judicial equity power must yield where Congress' plain words mandate otherwise. *Borgenicht v. Creditors' Committee*, 479 F.2d 150 (2d Cir. 1973).

In re Weis Securities, Inc., (Claim of Fowler) 1 Bankr. Ct. Dec. 1572 at 1573 (S.D.N.Y. 1975). It is beyond the equitable power of a bankruptcy court to say "No, the distribution scheme provided by the Act is a mistake, the rules. . . and the definition. . . are absurd and obsolete." *In re Ahlswede*, 516 F.2d 784, 788 (9th Cir. 1975). "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984).

The Sixth Circuit's refusal to award interest against SIPC is simply a recognition that to award interest on a customer's "net equity" would vitiate the precise "net equity" formula used by Congress, which measures the amount to be paid to a customer as of the "filing date." It is the exclusive remedy for customers to receive SIPC funds. Allowing post filing date interest would effectively alter the "net equity" definition to exclude reference to the filing date of the case. This would be tantamount to judicial legislation. This court has said:

> Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to es-

> cape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter.

Crooks v. Harrelson, 282 U.S. 55, 60 (1930); *accord, In re Feenstra*, 13 B.C.D. 370, 373 (Bkrtcy. W.D.N.Y. 1985).

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) stands for the proposition that courts may not alter a statutory formula for measuring an amount due under a federal statute, even where the result may be unjust or absurd. Thus, under a federal statute which measures damages for withholding wages for seamen, where the statute calls for "a sum equal to two days pay for each and every day during which payment is delayed," this court upheld an award of "over $300,000 simply because respondent improperly withheld $412.50 in wages." *Id.* at 575.

Griffin holds that where Congress has fixed a formula, the courts may not alter the formula, even if the result does an extreme hardship. Congress has measured the amount owed to the Issuers by enacting a specific formula, to wit, the customer's "net equity." Congress knows how to enact a draconian penalty for late payment—witness the *Griffin* case—but chose not to do so with SIPA. That is determinative of the issue here.

Any so called "equitable" argument to compel SIPC to pay interest in this particular case cannot be considered in a vacuum. If interest were allowed here, it would be in contravention of the general rule in bankruptcy that delays incident to litigation do not give rise to a claim for interest. *Vanston Bondholders, supra*, p. 7. More than that, however, allowance of interest against SIPC, where SIPA makes no provision for interest, would have a number of

by SIPC would effectively raise the statutory ceiling placed on the amounts SIPC is authorized to advance on behalf of any one customer.[17] The limits of SIPA protection are established (and periodically reviewed) by Congress in light of historical experience, legislative judgment, and parity with other parallel protective statutory plans administered by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, and the National Credit Union Administration.[18] The court should not upset this matrix. If post-petition interest is to be paid directly from the FDIC, FSLIC, NCUA, or SIPC, beyond the limits of any of those statutory formulas, the Congress should make this determination, not the courts.

The cases cited by the Issuers are irrelevant.

The cases cited by the Issuers in support of their position are irrelevant to the facts presented here. For example, the Issuers rely (Issuers' Petition, p.12-13) upon *Ticonic National Bank v. Sprague*, 303 U.S. 406 (1938). *Ticonic* holds that a secured creditor of a national bank in receivership may enforce his lien against his security, "where it is sufficient to cover both principal and interest, until his claim for both is satisfied." 303 U.S. at 413. Further, although that case involved the liquidation of a national bank, neither the FDIC nor any similar corporation was a party to the case. Even if the FDIC had been a party, it would not have expended any funds for

---

[17] On the facts of this case, an award of interest would compel SIPC to advance sums in excess of the then existing $50,000 limits set forth in SIPA as to some, if not all, of the plaintiffs. *See* note 6, supra p. 3. Two Issuers have already been paid their maximum SIPA advance; "interest" would cause other Issuers to receive an amount in excess of the statutory limits as well.

[18] SIPA presently provides that SIPC may advance up to $500,000 for each customer claim for cash or securities of which not more than $100,000 may be advanced on claims for cash. *See* SIPA section 78fff-3(a)(1)(1982). The latter sum is identical to the maximum advances allowed by the FDIC, FSLIC, and NCUA.

either principal or interest with respect to the disputed claim because that claimant was a secured creditor seeking satisfaction from the security alone. *Ticonic* simply has no bearing on this case.

The Issuers also rely upon *First Empire Bank v. FDIC*, 572 F.2d 1361 (9th Cir. 1978), *cert. denied*, 439 U.S. 919 (1978). That case did not involve depositors insured by the FDIC. Rather, it involved some of the failed bank's general creditors. The FDIC, *as receiver*, had in effect distributed nearly all of the failed bank's assets to other general creditors, thereby depriving the aggrieved general creditors of their ratable share in the distribution as required under the National Banking Act. Because of this failure, the aggrieved creditors were entitled to *contractual* interest. However, SIPC is not the fiduciary liquidating the Debtor's estate, nor did SIPC or the trustee distribute any assets in derogation of the Issuers' rights. The Sixth Circuit considered *First Empire* and correctly held it to be inapplicable.

Finally, *none* of the cases cited by Issuers in Point II of their Petition hold that a creditor, such as SIPC, can be required to pay interest as the "price" of a good faith challenge to the validity of another creditor's claim. There are no such cases.

Instead of discussing the relevant bankruptcy precedents, the Issuers' Petition cites several non-bankruptcy damage cases for the general and obvious proposition that federal courts have the power to award interest. But even these cases are not supportive of the Issuers' position. For example, the Issuers cite *United States v. Billings*, 232 U.S. 261 (1914), which is clearly irrelevant to the case at hand. (Issuer's Petition, pp. 7, 15, 19.) *Billings* involved interest on overdue taxes.

In *Billings* the court noted "the obvious unsoundness" of the taxpayer's position, and that the taxpayer's contentions contained "the self-evident demonstration of their

want of merit." 232 U.S. 261 at 283. The court also stated previous decisions on the subject had made the result beyond dispute. *Id.* at 284. In contrast, as the Sixth Circuit stated, the question of whether the Issuers were entitled to customer status at all was a case of first impression under SIPA. *SEC v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608, 609 (6th Cir. 1982). Indeed, the Sixth Circuit decided the matter on the narrow facts of the case, stating that "[w]e do not decide whether an issuer of securities who deals with an investment banker or underwriter only in more traditional ways may be a 'customer' under the Act." 679 F.2d 608 at 613. It can hardly be said, therefore, that SIPC owed a "clear obligation" to the Issuers, as existed in *Billings*.

Second, there was no evidence in the court below that SIPC "unreasonably withheld payment on an overdue account," as required by *Billings*. SIPC, joined by the trustee, made a reasonable, good faith argument which did not prevail. The Issuers simply did not demonstrate at trial that the delay was either unreasonable or caused by SIPC.

Similarly, the Issuers make repeated mention of an "unjust enrichment" theory. (Issuers' Petition, pp. 15, 16, 18). Suffice it to say that none of these cases deals with interest in the bankruptcy context. Further, to cite one of the cases relied upon by the Issuers, an interest award based upon unjust enrichment is "to prevent one from retaining a benefit conferred upon him by another." *Hermann v. Gleason*, 126 F.2d 936 at 940, (6th Cir. 1942). But the Issuers never conferred any benefit whatsoever upon SIPC. SIPC never received funds from the Issuers; the Debtor did. SIPC did not convert the Issuers' funds; the Debtor did.

Finally, the Issuers are unable to demonstrate that there is a conflict between any of the United States Circuit Courts of Appeals on any point germaine to the above.

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Nothing in the Sixth Circuit's construction of SIPA is in conflict with the opinion of any other circuit. Nothing in the Sixth Circuit's construction of general bankruptcy law is at variance with the controlling precedents long established by this Court. The Issuers have not presented an issue worthy of review by this Court.

II. The Miscellaneous Arguments Of The Issuers Do Not Alter The Result.

The Issuers raise a number of purported errors by the Sixth Circuit. None of these errors are directly related to the "Question Presented" as stated at page (i) of the Issuers' Petition. Indeed, the Issuers' Petition spends very little time whatever on the central issue in the case. Rather, the Issuers focus on auxilliary arguments which relate to holdings made by the Sixth Circuit which are separate and independent reasons for that court's determination that SIPC should not pay interest to the Issuers on the facts of this case. Three comments are in order. First, the Sixth Circuit was correct on each point. Second, these points are not worthy of review by this Court. Third, since the Sixth Circuit determined that interest cannot be paid in this case for four independent reasons, even if three were incorrect, the end result would not be altered.

The Issuers have admitted that SIPC litigated the issue of their "customer" status in good faith. SIPA section 15(c), 15 U.S.C. section 78kkk(c), is applicable.

The Sixth Circuit noted in its first opinion in this case that the legal question of whether an issuer of securities is a "customer" of a broker as to securities being sold to the public was a case of first impression. *SEC v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608, 609 (6th Cir. 1982). In the subsequent pleadings on the "interest" question, SIPC repeatedly asserted, as a complete defense, that "SIPC exercised good faith in all its dealings with the plaintiffs." Answer, p.3; First Amended Answer, p. 4; Second Amended Answer, p. 9.

At the subsequent trial of the "interest" question, counsel for the Issuers specifically stated that no fault attached to SIPC for the delays in litigating the question of whether the Issuers were customers. Counsel for the Issuers also stated that SIPC litigated the question of "customer" status in good faith. This is contrary to the position which the Issuers apparently take now. (Issuers' Petition, p.17.)

The trial transcript reflects counsel's statement with respect to whether any of the parties was at fault for the litigation delays. Counsel for the Issuers told the trial court "we are not, Your Honor, saying that there is any fault here." Trial transcript, June 13, 1984, p.48, *l.* 25 through p.49, *l.* 1. Further, on the question of whether SIPC litigated the question of the Issuers' "customer" status in good faith, counsel for the Issuers noted that "SIPC is investing its funds comfortably at the U.S. Treasury bill rate, while SIPC *unsuccessfully litigates a claim in good faith*, but unsuccessfully." Trial transcript, June 13, 1984, p.51 *l.* 25 through p.52, *l.* 2. (Emphasis supplied.) At trial, counsel for SIPC noted that "there has been a statement by counsel that litigation was not conducted in bad faith, but rather the opposite." Trial transcript, June 13, 1984, p.58 *l.* 4-8.

Based on the foregoing, the Sixth Circuit was entirely justified in referring to SIPA section 15(c), 15 U.S.C. section 78kkk(c),[19] as an independent reason for holding that Congress did not intend SIPC to pay interest in this case. On the foregoing record, it is inexplicable that the Issuers

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[19] SIPA section 15(c), 15 U.S.C. section 78kkk(c), provides:

LIABILITY OF SIPC AND DIRECTORS, OFFICERS, OR EMPLOYEES

Neither SIPC nor any of its Directors, officers, or employees shall have any liability to any person for any action taken or omitted in good faith under or in connection with any matter contemplated by this chapter.

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should suggest (Issuers' Petition, p.17) that "the case should have been remanded to the District Court for discovery and argument on the issue of bad faith." The Sixth Circuit did not "render an underlying *de novo* factual adjudication based on an incomplete record," as is stated at page 17 of the Issuers' Petition. Further, SIPC specifically argued the statutory immunity point to the Sixth Circuit in its main brief. The Issuers chose not to address this point.

The Issuers allege that SIPA section 15(c), 15 U.S.C. section 78kkk(c) is somehow not applicable because the legislative history of that section demonstrates that SIPC is not relieved of its liability for its contractual obligations. (Issuers' Petition, p.18). Yet the plain and simple fact is that there is no contract between SIPC and the Issuers. In short, the Sixth Circuit made no error in relying on SIPA section 15(c), 15 U.S.C. section 78kkk(c), as a separate and distinct reason for its decision. There is no basis for this court to review the Sixth Circuit on this ground.

The Sixth Circuit correctly construed *SIPC v. Barbour*.

The Sixth Circuit stated yet another independent reason for rejecting the Issuers' claims for interest. In reliance upon *SIPC v. Barbour*, 421 U.S. 412 (1975) the Sixth Circuit held that the District Court should have dismissed this action, because "SIPA does not give customers of failing broker-dealers an implied private cause of action to compel SIPC to take action under the SIPA." 788 F.2d 1208 at 1210. The Sixth Circuit was correct.

The Issuers did not seek an award of "interest" directly against the Debtor's estate. The bankruptcy law cases, cited above pp. 7-11, provide an insurmountable barrier to such recovery. Instead, by suing SIPC, the Issuers sought to do indirectly that which they could not do directly. SIPA's "net equity" definition limits what SIPC can advance in a SIPA liquidation. To allow a private right of action to compel SIPC to advance *more* than a customer's

"net equity" would frustrate the proper administration of SIPA, and render that definition meaningless. This would lead to wholly contradictory results, at variance with SIPA. The Sixth Circuit simply refused to allow a private suit against SIPC where SIPA plainly limits the Issuers to a "net equity" against the Debtor's estate.

To be sure, *SIPC v. Barbour* does not preclude all suits against SIPC. Actions on contracts, employment discrimination, or a myriad of other types of suits could surely be brought, and nothing in *SIPC v. Barbour* is to the contrary. That is the "plain meaning" of SIPA section 3(b)(1), 15 U.S.C. section 78ccc(b)(1). Where, however, a suit pertains to the amount of funds which SIPC may advance in a SIPA liquidation proceeding, litigants are not free to initiate a suit directly against SIPC.

The Issuers assert (Issuers' Petition, p. 8) that an implied right of action permitting them to sue SIPC directly for interest can be found in SIPA, under the test set forth in *Cort v. Ash*, 422 U.S. 66 (1975). This situation is clearly outside the bounds of *Cort*. In order to permit an implied private right of action under SIPA, *Cort* requires an examination of whether such a remedy is consistent with SIPA itself. It is not.

The implied private right of action which the Issuers seek to impose here is in direct *conflict* with those portions of SIPA which limit, with mathematical specificity, the amount a customer may receive in a SIPA proceeding. First, as noted above, the Issuers seek to impose a requirement upon SIPC to advance funds beyond the amount of each customer's "net equity." SIPA's "net equity" definition is a manifest expression of Congressional intent to limit SIPC's advances. It would be utterly inconsistent with the legislative intent of SIPA to circumvent this clearly defined limit by allowing a separate suit against SIPC for additional advances.

Second, any implied private right of action permitting recovery directly from SIPC, is at odds with SIPA section 9(a), 15 U.S.C. section 78fff-3(a) which states that SIPC may only advance funds *to the trustee*—not to customers directly.

Third, SIPA as presently enacted *does* permit customers to initiate a suit in one specific situation: when SIPC is acting in a "Direct Payment Procedure." *See* SIPA section 10(e), 15 U.S.C. section 78fff-4(e). It would therefore be contrary to the *expressio unius* doctrine to permit customer lawsuits in other contexts. For the foregoing reasons, a private right of action is not consistent with SIPA.

In short, when interpreting SIPA, and drawing inferences "from the structure of SIPC," *SIPC v. Barbour*, 421 U.S. 412 at 420, (1975), no implied right of action is consistent with SIPA in this case. In light of (1) the fact that the Sixth Circuit correctly construed *SIPC v. Barbour* and (2) the other independent reasons for denying relief to the Issuers, this ancillary question raised in the Issuers' Petition (pp. 6-11) is not worthy of review by this court.

The Issuers' reliance on 28 U.S.C. Section 1961(a) is misplaced.

A final point deserves brief mention. The Issuers maintain (Issuers' Petition, p.20) that the Sixth Circuit erred in not awarding interest to them for the period between the judgment in the "Pine Street" test case on "customer" status, and the advances by SIPC to the trustee on their behalf. The short answer to this is that Sixth Circuit's first opinion on this matter, 679 F.2d 608 (6th Cir. 1982), did *not* award a specific dollar amount to any Issuer. Indeed, the trustee requested that SIPC advance sums *beyond* the amount of the Issuers'claims for their "net equity." First, there was an active dispute *as to the amount*. Second, the "net equity" definition limits, with mathematical precision, the maximum amount SIPC may

advance in this liquidation. This issue is not worthy of review by this court.

CONCLUSION

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI.

Dated: August 21, 1986

Respectfully submitted,

Of Counsel:

MICHAEL E. DON
Deputy General Counsel

STEPHEN P. HARBECK
Associate General Counsel

THEODORE H. FOCHT
General Counsel
SECURITIES INVESTOR
PROTECTION CORPORATION
900 Seventeenth Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 223-8400

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No. 86-79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PINE STREET BAPTIST CHURCH, et al.,
Petitioners,

vs.

SECURITIES INVESTOR PROTECTION CORPORATION
and FRED D. BRYAN, TRUSTEE,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

PETITIONERS' REPLY BRIEF TO RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION'S BRIEF IN OPPOSITION

ROBERT D. TUKE
FARRIS, WARFIELD & KANADAY
Nineteenth Floor
Third National Financial Center
424 Church Street
Nashville, Tennessee 37219
(615) 244-5200
Counsel for Petitioners

Of Counsel:

KATHERINE M. ALLEN
FARRIS, WARFIELD & KANADAY
Nineteenth Floor
Third National Financial Center
424 Church Street
Nashville, Tennessee 37219
(615) 244-5200

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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PETITIONERS' REPLY BRIEF TO RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Respondent, Securities Investor Protection Corporation ("SIPC"), raised three issues in its Brief in Opposition which Petitioners did not discuss in their Petition for a Writ of Certiorari.[1] Petitioners' Reply Brief will address the following issues:

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[1] Petitioners have no parent companies, subsidiaries or affiliates to report pursuant to Rule 28.1 of this Court.

1. General rules of substantive bankruptcy law should not overrule the equitable principles applied by this Court and by other courts in insolvency proceedings.

2. The primary cases on which SIPC and the decision below rely support the Petition for a Writ of Certiorari.

3. The issue of good faith was never raised or argued at trial and was not a proper issue before the Court of Appeals.

ARGUMENT

I. The General Bankruptcy Rules Cited By Respondent Are Not Controlling.

Throughout respondent SIPC's Opposing Brief, SIPC attempts to rely on general rules of bankruptcy law to support its position. SIPC's basis for such reliance stems from the language in the Securities Investor Protection Act, 15 U.S.C. §§ 78 aaa *et seq.* (1982), ("SIPA") which applies certain sections of the federal Bankruptcy Code to the *conduct* of liquidation proceedings under SIPA. 15 U.S.C. § 78 fff(b). Applying procedural bankruptcy law to the *conduct* of proceedings and applying substantive bankruptcy law to equitable claims such as petitioners', however, are two entirely different matters. Substantive bankruptcy law does not govern, nor does it prohibit, petitioners' claims against SIPC.

As emphasized by the District Court, petitioners have asserted no claim for payment of interest against the debtor's estate or the Trustee. Rather, petitioners' claims are against SIPC to recover damages suffered from not receiving prompt payment and to recover, as a matter of unjust enrichment, monies earned by SIPC during the lengthy period it had the use of funds to which petitioners were rightfully entitled as customers under SIPA. Petitioners' interest claims are not

claims in bankruptcy and have nothing to do with the manner in which the debtor's liquidation proceeding is being conducted.

In 15 U.S.C. § 78 fff(b), SIPC clearly notes that the Bankruptcy Code provisions will apply only to liquidation *proceedings* and only "[t]o the extent consistent with the provisions of this Act." The previous section in SIPA states that one of the primary purposes of the Act shall be to satisfy customer claims "as promptly as possible." 15 U.S.C. fff(a)(1). The court below created an inconsistency with the provisions of SIPA immunizing SIPC from paying interest to petitioners after SIPC delayed in paying petitioners for over seven and one half years. The Court of Appeals rigidly applied broad rules of substantive bankruptcy law, but ignored the prevailing equitable principles followed by Courts in bankruptcy or insolvency proceedings, *see* cases cited by petitioners in their Petition for a Writ of Certiorari. The decision below conflicts not only with the provisions of SIPA itself, but with the principles upheld by this Court and by other courts in insolvency proceedings.

II. SIPC Relies On Cases In Which This Court Upheld Equitable Principles Supporting Petitioners' Claim For Interest.

In its Opposition Brief to Petitioners' Petition For Writ of Certiorari, SIPC relies heavily on two cases decided by this court, *Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156 (1946), and *Nicholas v. United States,* 384 U.S. 678 (1966). SIPC asserts that petitioners' failure to mention these cases in their Petition indicates a weakness in petitioners' argument. SIPC's and the Sixth Circuit Court of Appeals' reliance on these cases is misapplied. On the contrary, the opinions in both *Vanston* and *Nicholas* support the application of equitable principles underlying the District Court's Order that SIPC must pay interest to petitioners.

Justice Black bases his entire discussion in the *Vanston* case on his recognition that equitable principles guide federal courts in all insolvency proceedings. The opinion firmly states:

> It is manifest that the touchstone of each decision on the allowance of interest in bankruptcy, receivership, and reorganization has been a balance of the equities between creditor and creditors or between creditors and the debtor.

329 U.S. at 165.

In *Vanston,* this Court decided not to enforce a contract between a creditor and the debtor which provided for interest on interest payments because enforcement of the contract would have caused other creditors to suffer a direct loss. In short, the purpose of this Court's decision to refuse interest on interest payments was to prevent unequal treatment of creditors. The decision below is in direct conflict with the principles applied in *Vanston.* The Court of Appeals refused to recognize the principle that creditors should receive ratable treatment. Instead, the court below and SIPC take a position that results in unequal treatment of petitioners by refusing to compensate petitioners for their loss of interest over seven and one half years.

Furthermore, the concurring opinion in *Vanston* clearly distinguished cases, such as petitioners', in which the awarding of interest is a proper consideration for the trial court. Justice Frankfurter, writing on behalf of four Justices, explained:

> This is not a case where damages are claimed, in the form of interest, for the detention of monies due. In such a situation the right to interest and its measure become matters for judicial determination.

329 U.S. 171 (Frankfurter, J., concurring).

In *Nicholas v. United States,* this Court again articulated that decisions to refuse interest payments in an insolvency proceeding result from the underlying rationale that creditors must

receive equal treatment. In an important footnote, the *Nicholas* court quotes from an earlier Supreme Court Case:

> If all claims were of equal dignity and all bore the same rate of interest, from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of principal and interest combined. But some of the debts might carry a high rate and some a low rate, and hence inequality would result in a payment of interest which accrued during the delay incident to collecting and distributing the funds.

384 U.S. at 685, n. 12, *quoting American Iron & Steel Manufacturing Co. v. Seaboard Air Line Railway,* 233 U.S. 261, 266 (1914). The *Nicholas* opinion clearly recognized the same principle relied upon by the District Court in awarding interest to petitioners.

In the two primary cases cited in opposition to the Petition for Certiorari, this Court recognized the application of equity in *any* insolvency proceeding and the need to consider equality of treatment of creditors in deciding whether or not to award interest. As noted in their Petition, petitioners sued SIPC for damages and loss incurred by SIPC's seven and one half year delay in paying petitioners' claims. During that period, SIPC invested funds and earned a higher rate of interest than the statutory rate applied by the District Court. After fully balancing the equities among the parties, the District Court ordered SIPC to pay interest to achieve equality among the creditors in this case. The court below departed from this well-established principle by reversing the District Court's discretionary decision. The issue of a district court's authority to order SIPC to pay interest under these circumstances is important and ripe for review by this Court.

III. SIPC Failed To Raise "Good Faith" As An Issue In This Litigation.

In the second section of SIPC's Opposition Brief, SIPC argues in favor of the application of 15 U.S.C. § 78 kkk(c) by the Court of Appeals to "excuse" SIPC from having to pay interest. The Court of Appeal's reliance on 15 U.S.C. § 78 kkk(c) was faulty in two ways. First, this section was intended only to provide immunity in tort actions where SIPC acted in good faith. In contrast, petitioners have brought a quasi-contract action against SIPC. Second, SIPC did not assert good faith as an issue at trial and no evidence was presented by either side on this issue.

SIPC asserts that petitioners admitted that SIPC acted in good faith in delaying payment of funds to petitioners for over seven and one half years. Petitioners have never made such an admission. SIPC's quotes from the trial transcript were never made part of the Record on Appeal which SIPC submitted to the Sixth Circuit Court of Appeals. Moreover, such quotes, taken completely out of context by SIPC, were spoken by counsel for petitioners during closing argument in clarifying for the District Court the fact that the good faith or bad faith or fault of SIPC had not been raised as an issue in that trial.

Although SIPC did allege that it acted in good faith in its Answers to petitioners' Complaints, SIPC failed to preserve this defense for trial. Under Local Rule 11(b)(14) of the United States District Court, Middle District of Tennessee, the Final Pre-trial Order supplants all pleadings. The Final Pre-trial Order in this case specifically recited that the pleadings were amended to conform to the Order. Nothing in the Final Pre-trial Order refers to good faith as one of SIPC's defenses. The burden of raising this defense was on SIPC. Its failure to do so is why it was not an issue at trial. In fact, SIPC attempted unsuccessfully to assert this defense by letter *after* trial.

As stated in our Petition, the Court of Appeals' reliance on 15 U.S.C. § 78 kkk(c) as an alternative basis for its decision cuts against both the intent behind that section of SIPA and the Rules of Civil Procedure. This Court should grant petitioners a Writ of Certiorari to prevent such a misapplication of SIPA in the future.

CONCLUSION

For all these reasons and for the reasons cited in their Petition for a Writ of Certiorari, petitioners respectfully request that this Court issue a Writ of Certiorari and review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

Robert D. Tuke

FARRIS, WARFIELD & KANADAY
19th Floor
Third National Financial Center
Nashville, Tennessee 37219
615/244-5200

Counsel for Petitioners